

# 2016 FIRST QUARTER CASE LAW SUMMARIES

## KENTUCKY

### PENAL CODE – KRS 503 – FORCE

#### Jackson v. Com., 481 S.W.3d 794 (Ky. 2016)

**FACTS:** On several occasions, Jackson sold heroin to Chester (and his wife, Ashley). Jackson agreed to “front” Chester heroin, meaning that he would collect his payment later, rather than initially. When told that Chester was ready to pay, Jackson went to Chester’s Jefferson County home to collect, but Chester only gave him a partial payment. They argued and fought. Ashley, who was in another room, heard a gunshot and ran to the scene, finding Chester on the floor with Jackson standing over him, hand in his pocket. She saw a box cutter owned by Chester nearby, on the floor. Jackson fled but was promptly arrested.

Jackson later argued that he shot Chester in self-defense when Chester pulled what Jackson believed to be a pocket knife. He then panicked.

Chester was charged Manslaughter 1<sup>st</sup>. The jury was instructed on self-defense, but the Court denied Jackson the “no duty to retreat” qualification, under KRS 503.055(3). He was convicted and appealed.

**ISSUE:** Is someone unlawfully in a location entitled to claim self-defense?

**HOLDING:** No

**DISCUSSION:** The Court agreed that the judge properly denied the jury instruction. The Court looked to Com. v. Hasch, in which it had approved such an instruction, and noted that in Jackson’s case, he was not in a place he was allowed to be and was “engaged in an unlawful activity at the time.”<sup>1</sup> Even though he was an invitee, allowed to come into the premises, “his activity at the time of the shooting was illegal.”

The Court upheld his conviction.

### PENAL CODE – KRS 507 - MURDER

#### Gurley v. Com., 2016 WL 672817 (Ky. 2016)

**FACTS:** As Goldsmith was sitting on his motorcycle, at a traffic light, Gurley approached from behind, slowly. When the light turned:

Gurley did not appear to lessen his speed—no skid marks were detected at the scene—and struck Goldsmith’s motorcycle from behind. The force of the impact drove Goldsmith’s motorcycle into the vehicle directly in front of him and sent him flying into the air. In essence, Gurley drove his SUV through Goldsmith’s motorcycle his front bumper wedged under the car in front of Goldsmith; likewise, that car was wedged under the car directly in front of it. Goldsmith died from the injuries suffered in this crash.

Godsey, a witness, responded to assist. She approached Gurley and he asked her for a light. She did not respond to his request, agitating him, instead, she walked away. Officers Brittin and Zimmerman

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<sup>1</sup> 421 S.W.3d 349 (Ky. 2013).

(LMPD) arrived first and asked Gurley some questions. Godsey told Officer Zimmerman she thought Gurley was intoxicated.

Gurley was removed from his vehicle and escorted approximately ten to twelve feet—a distance Gurley still had trouble navigating—to the rear of an ambulance parked near the accident scene. There, Gurley momentarily took a seat on the ambulance's bumper. After this short break, Officer Zimmerman escorted Gurley to the highway median, near his patrol car. Officer Zimmerman testified he chose this location because it was safe from surrounding traffic. Repeatedly, Officer Zimmerman attempted to explain the field-sobriety tests to Gurley but was continually met not only with Gurley's rejection of such explanations but also his crude announcement of how intoxicated he was and his request to be taken to jail. The two then moved to the front of Officer Zimmerman's nearby squad car so Gurley's field sobriety test could be videotaped with the dash camera. Gurley failed to begin let alone complete—two different field sobriety tests correctly, at which point Officer Zimmerman acceded to Gurley's requests, arresting him and securing him in the squad car. At the police station, Gurley's blood-alcohol level was tested via Intoxilyzer and read 0.295, nearly four times the legal limit.

Gurley was indicted for Murder, Wanton Endangerment, Criminal Mischief, DUI and related offenses. He was convicted of everything, although the Wanton Endangerment charges were reduced to 2<sup>nd</sup> Degree. Gurley appealed.

**ISSUE:** Does intoxication excuse “wanton” behavior?

**HOLDING:** No

**DISCUSSION:** Gurley argued that the jury was not properly instructed and the possibility of a Reckless Homicide conviction was foreclosed. Specifically, he argued that wanton was not properly defined and by introducing language that “a person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.” The Court disagreed, finding that “wantonness is not found simply because an individual is intoxicated” - it is simply a factor. The Court agreed that the intoxication language added to the definition of wantonly is not the same as the defense of voluntary intoxication found in Kentucky Revised Statute (KRS) 501.080.” The Court noted that “Gurley is correct: voluntary intoxication, as a defense, operates to negate a particular mens rea, i.e. intent, and lowers the classification of the charged offense, e.g. intentional murder becomes wanton murder with proof of voluntary intoxication.” Although “KRS 501.080 applies to intentional crimes, ... his attempt to parlay that into eliminating the intoxication language from the definition of wantonly provided to the jury is baffling.” As such, “while affording relief to an 'intentional' offense a defendant's intoxication will not afford relief to an offense having 'wantonness' as its essential element of culpability.”

Also, at trial, Gurley sought to suppress the statements he made to Officer Zimmerman, as to his intoxication and desire to be taken to jail.<sup>2</sup> He argued that “that Officer Zimmerman had him in custody and should have provided Gurley with a reminder of his Miranda<sup>3</sup> rights.” The Court noted that:

... put simply, Gurley was not in custody at any point. Officer Zimmerman's interaction with Gurley was temporary and brief, lasting only a few short minutes. And the interaction took place in the median of a public highway, reducing “the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminish[ing] the motorist's fear that, if he does not cooperate, he will be subjected to abuse.” Officer Zimmerman's hold on Gurley's elbow does not rise near the level of custody covered by Miranda. Gurley's liberty or freedom to move was marginally affected, at worst. Without Officer Zimmerman's hold on Gurley's elbow perhaps he would have been free to stumble to the ground, but other than inhibiting that movement, we see little restraint. For purposes of Miranda, Gurley was never in custody.

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<sup>2</sup> Specifically, Gurley, with the aid of expletives, told Officer Zimmerman he was highly intoxicated, he did not know how much he had to drink, and he wished to go to jail.

<sup>3</sup> Miranda v. Arizona, 384 U.S. 436 (1966). For the sake of brevity, this will not be cited again.

Further, his argument that this was not a traffic stop, but a crime scene, is immaterial. The interaction was similar to that in *Berkemer*, with a “a single police officer ask[ing] respondent a number of questions and request[ing] him to perform a simple balancing test at a location visible to passing motorists.”<sup>4</sup>

The Court upheld his convictions for Murder, Wanton Endangerment and DUI.

## **PENAL CODE – KRS 508 - WANTON ENDANGERMENT**

### **Priddy v. Com., 2016 WL 304657 (Ky. App. 2016)**

**FACTS:** On October 1, 2013 Priddy called Starr (the mother of his two children) and told her to come and get the children immediately. As soon as she got off work, she went, with her boyfriend, Washington, to pick up the children. Starr went inside and found all the lights off. She turned on the lights and began to get the children out of bed but found Priddy pointing her gun at her head. She directed the children to go outside.

Starr later testified that “Priddy was telling her that he wanted them to be a family and that he was going to kill them all so they would all be together in heaven.” Starr left without injury and departed with Washington, reporting what had occurred the next day to Paducah PD. During a phone call to Priddy, during which Officer Davie listened, Priddy apologized for pointing the gun at her and threatening to kill her. Priddy was indicted for Wanton Endangerment 1<sup>st</sup>. He was convicted and appealed.

**ISSUE:** Is pointing a gun at someone Wanton Endangerment in the First Degree?

**HOLDING:** Yes

**DISCUSSION:** Priddy argued that holding a gun to someone’s head under those circumstances was not enough to prove “substantial danger of death or physical injury” as required under Wanton Endangerment 1<sup>st</sup>. The Court, however, agreed that under *Com. v. Clemmons* (and earlier cases), the act of pointing a firearm at another person can be considered Wanton Endangerment.<sup>5</sup>

The Court upheld his conviction.

## **PENAL CODE – KRS 511 – BURGLARY**

### **Asher v. Com., 2016 WL 1069029 (Ky App. 2016)**

**FACTS:** On November 1, 2012, Asher “unlawfully entered the home of Jan and Herschel Dean Asher in Leslie County.” He gained entry by breaking the glass panel in a door, which opened into an addition of the house. He fled out that same door when he encountered Herschel. He removed nothing from the house, but Herschel discovered that “Asher had taken five or six of Herschel’s guns from his gun cabinet and had stacked them together on the floor.”

Asher was indicted for Burglary 2nd and Theft by Unlawful Taking. He was convicted and appealed.

**ISSUE:** Is removing guns from a gun cabinet, even if not removed from the house, enough for a Burglary in the First Degree?

**HOLDING:** Yes

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<sup>4</sup> *Berkemer v. McCarty*, 468 U.S. 420 (1984).

<sup>5</sup> 734 S.W.2d 459 (Ky. 1987).

**DISCUSSION:** Asher’s appeal focused on whether his removal of the guns, from the cabinet, “resulted in his being ‘armed with a deadly weapon’ for purposes of the burglary statute, an element required under KRS 511.020.” (The weapons were apparently loaded.) The Court agreed that a “person may become ‘armed with a deadly weapon’ for the purposes of first-degree burglary when he enters a dwelling unarmed and subsequently takes possession of a firearm while inside.”<sup>6</sup> It did not require, however, that the guns actually “be taken away from the property.”<sup>7</sup> As such, the Court upheld his Burglary 1<sup>st</sup> conviction.

With respect to the Theft, the Court also looked to the statute, in this case, KRS 514.030, which requires the individual “take or exercise control over movable property of another” – with the intent to deprive. The Court agreed that “the actual taking of an item is not required for there to be a completed theft by unlawful taking,” the exercise of control over it is sufficient.

The Court affirmed his convictions.

## **PENAL CODE – KRS 520 – CONTRABAND**

### **Adams v. Kentucky Dept. of Corrections, 2016 WL 1178580 (Ky. App. 2016)**

**FACTS:** During a search on April 24, 2012, Adams, an inmate at a state prison, was found in possession of a pornographic DVD. He was written up for promoting dangerous contraband. Six months of good time credit were removed from him and he appealed.

**ISSUE:** Is a DVD dangerous contraband?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Adams argued that a DVD was not dangerous contraband. The Court looked to KRS 520.010(3), which provides a list of some items but leaves open the definition to include other, unlisted items. In an unpublished case, the Court had agreed that DVDs are dangerous, and it is specifically listed in the DOC’s regulations.

The Court upheld the discipline.

## **PENAL CODE – KRS 530 – INCEST**

### **Howard v. Com., 484 S.W.3d 295 (Ky. 2016)**

**FACTS:** Howard was involved in a sexual relationship with his adult stepdaughter, in Garrard County. He was charged with multiple counts of Incest. He moved for dismissal, insisting that the situation did not constitute a crime. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** May adults in a “step” relationship be charged with Incest?

**HOLDING:** Yes

**DISCUSSION:** Howard continued to argue that the “incest statute [KRS 530.020] did not criminalize consensual sexual intercourse between non-blood related adults who never had a parent/child relationship.” The Court looked to the language of the statute, which uses the term “stepchild” – which Howard insisted meant that the individual had to be a legal “child” – under 18. The Court, however, looking to the ordinary dictionary meaning of child, noting that the word has dual meanings and that a child will be their parents’ (or in this case stepparents’) forever. The actual statute, in fact, never uses the

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<sup>6</sup> Hayes v. Com., 698 S.W.2d 827 (Ky. 1985).

<sup>7</sup> Wilson v. Com., 438 S.W.3d 345 (Ky. 2014).

term child in any way. Age only becomes an issue in incest when it comes to the penalty. Specifically, the Court looked to Raines v. Com. and Jones v. Com. and agreed that “sexual intercourse between a stepparent and an adult stepchild threatens the family unit.”<sup>8</sup> The Court upheld his plea.

## RESTITUTION

### McGruder v. Com., 2016 WL 304622 (Ky. App. 2016)

**FACTS:** Nelson’s vehicle was stolen on January 27, 2013, from his garage in Louisville. On February 1, McGruder was arrested by Jeffersontown PD, when he was caught driving it. It was released back to Nelson. McGruder (and his passenger) were charged with a variety of offenses, including Receiving Stolen Property. He pled guilty and agreed to pay restitution, to be determined at a hearing. The next day, the Commonwealth tendered a request for restitution in the amount of \$5,379.28, due to pry damage. A small amount was also designated for cleaning the car because of the stench of marijuana smoke in it. McGruder argued that since he wasn’t convicted of stealing the car, any damage related to the theft itself could not be attributed to him. The trial court denied his claim and McGruder appealed.

**ISSUE:** Does an agreement to pay restitution (not yet set) hold even if they later disagree with the amount?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that McGruder agreed to pay “any and all” restitution in his plea deal. Further, he was given the opportunity to argue the amount of restitution under KRS 532.032 and Jones v. Com.<sup>9</sup> As such, the Court upheld the full amount of the restitution.

## DRIVING UNDER THE INFLUENCE

### Farmer v. Com., 2016 WL 1178558 (Ky. App. 2016)

**FACTS:** On October 1, 2012, at about 1 a.m., Farmer crashed her truck through an Ohio County home. A child was injured, as was the owner of the house. Farmer told them that her insurance would cover it. Deputy Wright, Ohio County SO, arrived, along with Trooper Baker (KSP). Deputy Wright later stated Farmer smelled of alcohol and admitted to having two beers. Trooper Baker did several FSTs, which indicated intoxication. Both officers later stated Farmer was “belligerent and uncooperative.” Sgt. Gentry transported her to the hospital for a blood test, which she declined.

Farmer was charged with Assault (both 1<sup>st</sup> and 2<sup>nd</sup> degree), Wanton Endangerment, DUI and related charges. She was convicted of most of the charges and appealed.

**ISSUE:** Is it proper for an officer to testify about a DUI refusal?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Farmer argued it was improper to allow Sgt. Gentry to testify that she refused the blood test. KRS 189A.105(2)(a) expressly permits it, however. Farmer argued that the “police were required to obtain a search warrant following her refusal to submit to a blood test.” The Court noted that “implied-consent statutes do not violate the Fifth Amendment’s protection against self-incrimination.”<sup>10</sup>

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<sup>8</sup> 379 S.W.3d 152 (Ky. Ct. App. 2012); 2007 WL 2882890 (2007)

<sup>9</sup> 382 S.W.3d 22 (Ky. 2011).

<sup>10</sup> South Dakota v. Neville, 459 U.S. 553 (1983).

In addition, Farmer argued that the Commonwealth should not have been allowed to introduce evidence of her behavior under KRE 404(b). The Commonwealth noted that under RCr 7.26, it was required to produce “relevant witness statements” no less than 48 hours before trial, which it did. The Court, however, concluded that the evidence of her behavior was “inextricably intertwined” with the evidence of the accident so “as to render its introduction unavoidable.”<sup>11</sup> Although the evidence cast Farmer in a “bad light,” the Court did not conclude it was unfairly prejudicial.

The Court upheld Farmer’s conviction.

## **CONTROLLED SUBSTANCES**

### **Com. v. Stephenson, 2016 WL 749065 (Ky. App. 2016)**

**FACTS:** In September, 2010, a Louisville Metro officer stopped Stephenson on suspicion of DUI. The officer found hydrocodone prescribed by two different doctors. The officer also smelled marijuana and Stephenson admitted he’s “just smoked some.” Within 24 hours of the arrest, Metro PD requested medical records from the two doctors who had prescribed the medication and both provided said records. Stephenson was then charged with “obtaining or attempting to obtain a controlled substance by fraud or deceit” pursuant to KRS 218A.140(1). He was indicted. A year later, the Commonwealth requested a motion to obtain records from one of the doctors, which was granted. (In a footnote, the decision indicated that the initial obtaining of the records was an illegal seizure.)

Stephenson moved to exclude all of the medical records. The Court agreed and the Commonwealth then moved to dismiss the case without prejudice, which was granted. In September, 2013, the Commonwealth reinstated the case. The Commonwealth moved for a reconsideration of the exclusion of the evidence, arguing that the seizure was lawful under KRS 218A.280 and that Stephenson lacked an expectation of privacy. (They further argued that the same information could have been obtained through a KASPER request, and as such, the inevitable discovery doctrine applied.) The Court agreed with Stephenson and the Commonwealth appealed.

**ISSUE:** Is there an expectation of privacy in medical records?

**HOLDING:** Yes

**DISCUSSION:** The Court first looked at whether Stephenson had an expectation of privacy. The courts “value whether an expectation of privacy is ‘reasonable’ by determining whether an individual possesses: (1) a subjective expectation of privacy in the object of the challenged search; and whether (2) society is willing to recognize that subjective expectation as reasonable. Such expectations are only “reasonable” if they have “a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”<sup>12</sup> Kentucky has already concluded that “a person possesses a reasonable expectation of privacy in his or her medical records.”<sup>13</sup> This was reaffirmed in Williams and as such, the Court agreed, “Stephenson expected that his medical records would be private, and that our society deems that expectation reasonable.” That expectation is consistent with HIPAA.<sup>14</sup> With respect to KASPER, the Court agreed that “citizens have no reasonable expectation of privacy in this limited examination of and access to their prescription records” contained within the KASPER database.” However, “KASPER searches reveal only basic records – a patient’s name and type of controlled substances he or she is prescribed. It does not include the breadth of information revealed in this search of Stephenson’s records that included his doctors’ narrative treatment reports, their diagnoses, etc. The Commonwealth’s attempt to analogize Detective Watts’ action to a KASPER search is unconvincing. We are not persuaded by this argument.”

<sup>11</sup> Major v. Com., 177 S.W.3d 700 (Ky. 2005); Funk v. Com., 842 S.W.2d 476 (Ky. 1993).

<sup>12</sup> Rakas v. Illinois, 439 U.S. 128 (1978).

<sup>13</sup> Thacker v. Com., 80 S.W.3d 451 (Ky. App. 2002) (overruled on other grounds in Williams v. Com., 213 S.W.3d 671 (Ky. 2006))

<sup>14</sup> Yeager v. Dickerson, 391 S.W.3d 388 (Ky. App. 2013).

The Court further noted that KRS 218A.280 does not suggest no expectation of privacy, only that “a defendant may not assert a testimonial privilege to prevent a medical practitioner from testifying about the defendant’s attempts to illegally obtain controlled substances.” The Court further found no evidence that this would, in fact, have been inevitably discovered.<sup>15</sup> The Court noted that the subsequent court order was because of the indictment and the indictment was predicated on an illegal search and seizure.

The Court upheld the denial of the motion for reconsideration.

## **SEARCH & SEIZURE – WARRANT**

### **Witherspoon v. Com., 2016 WL 837194 (Ky. App. 2016)**

**FACTS:** On September 25, 2013, Witherspoon sold several pills (morphine) to Quinn, a CI working for KSP. A few weeks later, he sold two Dilaudid to another CI, this was recorded. Both transactions occurred in Morganfield (Union County). On November 1, Dets. Wise and Jenkins (KSP) went to Witherspoon’s home to make an arrest. Once inside, Det. Wise spotted marijuana and went to get a search warrant. Witherspoon was arrested, taken to jail and the residence secured. During the warrant search, an assortment of drug evidence was found. However, according to later court testimony, the warrant was never returned to the court, as required.

Witherspoon was charged with Trafficking and related charges. He moved for suppression and was denied. He was convicted of one count of Trafficking and appealed.

**ISSUE:** Does failure to file a return invalidate a warrant?

**HOLDING:** No

**DISCUSSION:** Witherspoon first argued that the officers searched his home before the warrant was obtained. Two witnesses, including the actual owner of the home, testified that items were being removed before the time the warrant was obtained. Both detectives, however, testified that nothing was searched prior to the warrant being procured. The Court noted that the warrant was signed at 11:12 and would have been available within minutes for use. The time the witnesses indicated, before noon, “could be absolutely correct and wholly in harmony with the testimony of the detectives.” The Court also noted that the time stamp on the faxed warrant was incorrect, and indicated the day before the affidavit was filed. However, the evidence all indicated that the warrant and the affidavit were both done on the same day. Finally, Witherspoon argued that the warrant was not properly returned to the court, pursuant to RCr 13.10(3). Both detectives testified they did not return to the document to the judge, with the required inventory, as both assumed the other was doing so. (Four warrants had been served that day, pursuant to a larger operation.) The Court agreed that although required, failure to do so did not invalidate the warrant’s proceeds.<sup>16</sup>

Further, a procedural error that was violated, but in good faith, and that with did not prejudice the defendant in any way, does not require suppression.<sup>17</sup> Since nothing indicated the warrant was invalid or not properly executed, the Court agreed that noting warranted suppression.

Finally, Witherspoon argued that prior to trial, it had been agreed that the witnesses could not testify “about the identity of substances which had not been tested by the KSP laboratory.” However, Det. Wise testified as to the substance he initially spotted, although it had not been tested. He was rehabilitated by the prosecutor and from that point, only the term “suspected” was used. The Court agreed that although it was error, the “statement was brief and made in the context of a lengthy narrative.” Further, the Court noted that the admission of certain evidence was proper, even though all evidence related to methamphetamine had been suppressed as that charge was directed by the trial court. Specifically,

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<sup>15</sup> Nix v. Williams, 467 U.S. 431 (1984).

<sup>16</sup> Moore v. Com., 268 S.W. 563 (1925)

<sup>17</sup> Copley v. Com., 361 S.W.3d 902 (Ky. 2012).

cash, a weapon and a sign concerning “no credit” was permitted, as that would be relevant evidence of the remaining trafficking charges.

Finally, the Court agreed that Det. Jenkins’ testimony about the reliability of his informants, even though only the transaction involving 1 was actually before the jury. The Court, however, did not conclude that the outcome would have been different even had he not testified about the informants.

**Abney v. Com., 483 S.W.3d 364 (Ky. 2016)**

**FACTS:** On August 29, 2011, Deputy Reed (Powell County SO) was contacted by the Powell County Sheriff that the Sheriff was “following a vehicle that appeared to be driven by someone under the influence.” Deputy Reed caught up and took the lead. He observed the vehicle weaving and made a traffic stop. Cody Abney was driving, with Gould and Dallis Abney (Cody’s father) as passengers. Deputy Reed obtained permission to search the vehicle. He later stated that the car smelled of marijuana and he found “narcotics not in their original container” in Gould’s purse. Dallis, when asked for ID, pulled it, approximately \$6,000 in cash and other items from his pocket. (He also pulled out what appeared to be a few leaves of marijuana but it was never tested.) Dallis was arrested for trafficking in marijuana. Both Dallis and Gould were arrested, Cody was detained but eventually released.

Deputy Reed asked Cody about drug trafficking at the Estill County home he shared with Dallis. Cody admitted that Dallis had weighed marijuana on scales and that he’s seen money and marijuana in a safe. He gave information about where to find a large quantity of marijuana at the house. Cody denied giving this information later, however.

Because it involved another county, Deputy Reed obtained help from KSP, which obtained the actual warrant. Trooper Brewer spoke to someone identifying themselves as Cody on the phone and confirmed the information, and that there was 15 pounds of marijuana at the house at the time, with more hidden around the house. Trooper Brewer obtained a search warrant. During the subsequent search, a large quantity of marijuana was found as well as prescription pills. Dallis was charged with trafficking, both in drugs and controlled substances.

Dallis moved for suppression, claiming the affidavit was “factually flawed.” He claimed that the affidavit did not disclose “the time at which the observation was made,” that the drugs were there.<sup>18</sup> The Court denied his petition and then took a conditional guilty plea to most of the charges. He then appealed.

**ISSUE:** Has Henson v. Com., which requires specific information in a warrant, been overruled?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Henson v. Com. had never been expressly overruled. In Henson, the Court had stated that “the necessity for a simply statement of how and when an allegedly existing fact was observed could be unreasonable or burdensome only to one who actually does not have enough reliable information to justify the warrant. The onus of being specific is little enough price for the suspension of so valuable a right.” But later, in Gates v. Illinois, the Court did away with such “technical requirements for warrants and their supporting affidavits,” instead allowing a more fluid totality of the circumstances analysis. The Court noted that “affidavits are frequently drafted by non-lawyers, who cannot be expected to keep abreast of ‘each judicial refinement’ relating to probable cause.” They are often also “done in haste.” Allowing warrants to proceed on “a reasonable rather than a hypertechnical basis,” would be advantageous, as it would incentivize officers to actually get warrants, which “gives the assurance that there is a need to search, that the search is limited, and that it is being done under lawful authority.”

As such, the Court noted “to the extent that Henson applies more specific requirements to a search-warrant affidavit, and, in effect, requires a more rigorous review, it is overruled.” It is not invalid “simply

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<sup>18</sup> Henson v. Com., 347 S.W.2d 546 (Ky. 1961).

because it does not include the time and date of any observations on which it relies, provided the totality of the circumstances indicates with reasonable reliability that the evidence sought is located in the place to be searched.” It is, however, it emphasized, “always the better practice to include such information, as it forecloses any complaint about the stateless of the information.”

In reviewing the affidavit, the Court ruled that the “clearly contains sufficient facts to support a finding of probable cause.” Both Deputy Reed and Trooper Brewer spoke to Cody, who indicated the marijuana was there at the time and the warrant was immediately obtained and executed. The judge noted Cody had a valid reason to lie at the hearing, about not having given the information, as he was afraid of the depth of trouble his father was in.

The Court upheld the warrant and Dallis Abney’s plea.

## **SEARCH & SEIZURE – WARRANTLESS**

### **Feltha v. Com., 2016 WL 837195 (Ky. App. 2016)**

**FACTS:** On September 24, 2013, two officers with the Campbell County Drug Task Force arranged for a controlled drug buy. Det. Marcus and Officer Vance sat in a vehicle and monitored the conversation between the CI and “J” (Feltha) – with Det. Buemi acting as the backup. They met with the CI after the fact and took the purchased drugs from him. A second buy was made a few weeks later, involving the same CI, but with Det. Birkenhauer also involved. The CI, in that case, however, gave the detectives makeup rather than drugs, saying she’d ingested the drug (heroin). Apparently, in both cases, the seized substances were not, in fact, controlled substances. She told the officers that Feltha was coming to her house later to give her more drugs. On the day of the arrest, October 21, the officers observed a known drug user enter and then leave Feltha’s residence some ten minutes later. He had fresh track marks and indicia that he’d just used drugs. The officers immediately arrested Feltha without a warrant and seized cocaine from his person.

Feltha was charged with Trafficking 1<sup>st</sup> (two counts) and related charges. Feltha moved for suppression related to evidence found during his arrest and a search of his residence, and later added a claim that the search warrant was defective. The trial court ultimately overturned his motion, finding that the evidence in question would have inevitably been discovered. Feltha took a conditional guilty plea and appealed.

**ISSUE:** If an arrest is invalid, is the search subsequent to that arrest also invalid?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that under KRS 431.005(1)(c), the officers made a valid felony arrest, and as such, it was appropriate to search him.<sup>19</sup> However, the Court noted, the original charges had been amended to misdemeanors and it was clear that the officers knew that the first substance seized was not a controlled substance before the second transaction, yet they failed to check before making the arrest. There was also no indication that the user that was stopped leaving Feltha’s home purchased drugs from him. The Court agreed that the entry into the home was invalid and there was no indication that they would, in fact, have inevitably been able to lawfully enter.

With respect to the warrant, the Court agreed that some of the evidence submitted in the affidavit was found inside the home, when the officers unlawfully entered. Further, the CI was not reliable and in fact, no “real” drugs were involved in the transactions. The Court reversed his plea.

### **Smith v. Com., 2016 WL 447714 (Ky. App. 2016)**

**FACTS:** On May 18, 2014, Officers Smith and McCullough, began patrolling a HUD housing complex. The spotted two men standing in a parking lot but they walked off as the officers approached.

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<sup>19</sup> Frazier v. Com., 406 S.W.3d 448 (Ky. 2013); Chimel v. California, 395 U.S. 752 (1969).

Officer Smith then noticed Lavonta (Smith) sitting in a parked vehicle about 20-25 feet away. When Lavonta spotted the officers, he “looked shocked and began looking around, as if seeking an escape route.” As Officer Smith approached, he smelled marijuana, as did Officer McCullough, approaching from the passenger side. Lavonta denied smoking marijuana, but stated his friends had done so. He produced ID and spoke about his purpose for being there. Officer Smith asked Lavonta get out, but before he did so, the officer spotted a “shiny object” in Lavonta’s pants pocket. He admitted having “something he should not have.” A revolver was retrieved from his pocket. Lavonta then got out and was frisked. He was given Miranda but told he was not under arrest. He admitted to being both a convicted felon and being subject to an active DVO. Nothing more was found in the car. He was charged for the gun and the violation of the DVO.

Lavonta later testified that the vehicle belonged to a female friend (in fact, it belonged to her mother) and at the time, the car was running, the lights were off, and the windows were up. At trial, the defense noted there was no lighter or paraphernalia in the car, which called into question the “smell of marijuana.” The trial court indicated that although this was not a classic traffic stop, the officers’ actions did likely put Lavonta into a situation where “he probably did not feel free to leave or to ignore Officer Smith’s commands.” (Although never indicated, the court noted it assumed Misty did live there and that Lavonta was not trespassing.) The trial court agreed that this was a reasonable investigation under the circumstances and upheld the stop. Lavonta took a conditional guilty plea and appealed.

**ISSUE:** Is a reasonable suspicion detention that evolves into an arrest, based upon developed probable cause, valid?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that “while searches conducted pursuant to a warrant are preferred, not all warrantless searches are unconstitutional, only those that are unreasonable.”<sup>20</sup> The trial court had considered the evidence and found the two officers more credible. Once the officers were lawfully interacting with Lavonta, “each subsequent event determined the next police response, and each of those responses was reasonable under the circumstances.”

The Court affirmed the plea.

### **Binion v. Com., 2016 WL 749508 (Ky. App. 2016)**

**FACTS:** On July 15, 2012, Officer Williams (Olive Hill PD) was patrolling. He had been approached earlier by a “street contact” that someone was manufacturing methamphetamine in the area. Trooper Marcum (KSP) was also in the area, “following up on a separate complaint from a person who said that Binion had accosted his girlfriend with a baseball bat and a gun, and that Binion was making methamphetamine at that location.” At about 1 a.m., both heard a loud explosion, from possibly a long gun. Williams saw a puff of smoke and both officers approached the outbuilding from where it came. They split up, with Officer Williams going to the front of the outbuilding and the trooper walking past it, into the yard. Officer Williams later stated that “when he was approximately five to seven feet from the outbuilding, he saw a vapor coming from the door and smelled a strong odor consistent with methamphetamine,” and heard movement inside. Both approached the door and Williams knocked. He opened the unlocked door and found Binion cooking methamphetamine, along with another individual. “Trooper Marcum described the fumes within the outbuilding as “strong enough to knock a person down,” and that his own eyes and lungs were burning. He also developed a headache after only a few minutes. Both Binion and the other man were arrested. Binion argued for suppression and that the entry was improper. The trial court disagreed. Binion took a conditional guilty plea to facilitation to manufacture and appealed.

**ISSUE:** Is an exigent entry justified when there is concern about possible gunshots?

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<sup>20</sup> U.S. v. Rabinowitz, 339 U.S. 56 (1950).

**HOLDING:** Yes

**DISCUSSION:** The trial court had “concluded that exigent circumstances existed which allowed warrantless entry onto the property and into the outbuilding. The Court found that, while both officers were investigating reports involving the manufacture of methamphetamine, their primary purpose for entering the curtilage of the property was to investigate sounds of gunfire or an explosion and to render assistance to anyone who may be injured. The Court agreed that it is a basic principle of Fourth Amendment Law that searches and seizures inside a home without a warrant are presumptively unreasonable.”<sup>21</sup> Likewise, the Kentucky Constitution also protects citizens from unreasonable searches and seizures without a warrant.<sup>22</sup> Generally, a house and its surrounding curtilage are protected by the Fourth Amendment’s proscription against warrantless searches and seizures.<sup>23</sup> For purposes of this action, the Commonwealth conceded that the outbuilding was within the protected curtilage of the property and that the officers made a warrantless entry onto the curtilage.

All searches without a warrant are presumed unreasonable, unless a valid exception can be applied. That burden falls to the Commonwealth.<sup>24</sup> However, the Court recognized that one of the exceptions “is when “the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”<sup>25</sup> One of the recognized exigent circumstances is “those which require swift action when officers reasonably believe that a person within is in immediate need of aid.”<sup>26</sup> The police may seize any evidence that is in plain view during the course of their legitimate emergency activities.<sup>27</sup>

Binion argued that the circumstances were not sufficient to indicate that anyone was, in fact, in need of aid, and that their presence to investigate methamphetamine manufacture tainted their decision to enter, in that they were “primarily motivated by that information rather than any reasonable concern that persons on the property were in need of immediate aid.” The Court agreed that the trial court’s assessment of the motivations of the officers was proper and that they were found to be credible. The Court noted that the “prior complaints merely legitimized the officers’ suspicions that the noise heard was gunfire or an explosion.” Given the late hour, it was reasonable to believe that there might be injuries and that “swift, immediate action may be necessary to render aid.”

The Court upheld the decision and his plea.

## **SEARCH & SEIZURE – CURTILAGE**

### **Martin v. Com., 2016 WL 447745 (Ky. App. 2016)**

**FACTS:** On September 24, 2010, Martin’s Bath County home was searched by KSP following an anonymous tip. Troopers Shortridge and Alcalá initially approached the home, via the front porch, to do a knock and talk. Trooper Shortridge, as a precaution, went to the rear of the residence. From that vantage point, he could see digital scales inside the house. Hearing Martin talking to Trooper Alcalá, Shortridge returned to the front. Martin agreed to walk the troopers around the property. As they did so, Martin told them his girlfriend was inside the house. Trooper Shortridge asked if it would be alright to talk to her, and Martin agreed, so the trooper went back to the house.

On the front porch, the trooper found the interior door open. Gamble, the girlfriend, responded to Shortridge’s knock. He asked to come inside and she agreed. Once inside, he detected a strong odor of marijuana and saw a loaded, cocked, handgun lying on the couch. He cleared the handgun and asked if anyone else was inside, she said there was not. He walked through the rest of the house for “officer

<sup>21</sup> Payton v. New York, 445 U.S. 573 (1980).

<sup>22</sup> See Hallum v. Com., 219 S.W.3d 216 (Ky. App. 2007).

<sup>23</sup> Dunn v. Com., 360 S.W.3d 751 (Ky. 2012), citing U.S. v. Dunn, 480 U.S. 294 (1987).

<sup>24</sup> Gallman v. Com., 578 S.W.2d 47 (Ky. 1979).

<sup>25</sup> Mincey v. Arizona, 437 U.S. 385 (1978).

<sup>26</sup> See also Dunn, supra at 757, and Todd v. Com., 716 S.W.2d 242 (Ky. 1986).

<sup>27</sup> Mincey, 437 U.S. at 393, 98 S. Ct at 2413.

safety.” He spotted, in plain view, marijuana, a roach and residue. Gamble never objected; Martin was never asked for consent to enter or search.

Alcala and Martin returned. Martin, upset at finding Shortridge inside, “angrily opened drawers in the living room and threw a large bag of marijuana at the officers.” They obtained a search warrant and found a quantity of marijuana around the home and property. Martin moved for suppression and was denied. He was convicted and appealed.

**ISSUE:** May officers approach a front door freely?

**HOLDING:** Yes

**DISCUSSION:** First, the Court agreed that the knock and talk was proper, even though, of course, the process invades the curtilage.<sup>28</sup> To determine if an area is within protected curtilage, four factors are involved: “the proximity of the area to the home, whether the area is included in an enclosure with the home, how the area is used, and steps the resident has taken to prevent observation from the people passing by.”<sup>29</sup> However, certain areas are intended to allow the public to approach the house, such as a front walkway. Although the trooper’s approach at the back of the house was improper, as an invasion of the curtilage, it was unconnected to the search inside the house and thus did not compel suppression.

With respect to Shortridge’s entry into the house, the Court agreed that Gamble’s consent was sufficient, as she had common authority.<sup>30</sup> The person who answers the door is presumed to have authority to allow someone to enter.<sup>31</sup> Even though t as he trooper did not know the status of the relationship, and whether she actually lived at the home, the Court agreed that the trooper’s action was reasonable. “Trooper Shortridge’s detour into the other rooms of the home notwithstanding, what he saw and smelled immediately after gaining consent to enter and upon crossing the threshold was sufficient to justify further investigation.”

Martin’s conviction was affirmed.

### **Com. v. Dixon, 482 S.W.3d 386 (Ky. 2016)**

**FACTS:** KSP received an anonymous tip that Dixon was “using and making methamphetamine” in his Hart County home. Troopers White and Smith responded and learned that the address actually belonged to Dixon’s mother. She indicated that “Dixon lived in a nearby trailer separated from her house by woods.” They went down a gravel road, past two more homes, and found Dixon’s trailer and the end that that road.

The troopers noted several indications of methamphetamine production at Dixon’s trailer, including: an open fire burning near the front door, which smelled like burning plastic; windows covered from the inside; and four vehicles parked in the driveway. The troopers approached the front door in order to perform a warrantless knock and talk, but before they reached it, Dixon came out of the trailer and met them in front of the porch.

Trooper White spoke to Dixon, while Trooper Smith “walked along the outskirts of the maintained area surrounding the trailer to watch for anyone attempting to flee through the back door.” Although Dixon stated he wanted to cooperate, he would not allow a search of the trailer without a warrant. Trooper Smith radioed that he could see two one-step meth labs near the back porch. Trooper White joined Trooper Smith “at his position in tall grass, about 15 feet from the back porch.” They saw smoke coming from inside and smelled a “chemical odor consistent” with a meth lab. Upon being asked, Dixon stated he had friends inside the trailer. “Acting pursuant to what they believed to be exigent circumstances, the

<sup>28</sup> Quintana v. Com., 276 S.W.3d 753 (Ky. 2008); Oliver v. U.S., 466 U.S. 170 (1984).

<sup>29</sup> Dunn v. Com., 360 S.W.3d 751 (Ky. 2012); U.S. v. Dunn, 480 U.S. 294 (1987).

<sup>30</sup> U.S. v. Matlock, 415 U.S. 164 (1974).

<sup>31</sup> U.S. v. Jenkins, 92 F.3d 430 (6<sup>th</sup> Cir. 1996).

troopers entered the trailer and evacuated the occupants for safety reasons. During their protective sweep, the troopers observed methamphetamine precursor chemicals and three more bottles that also appeared to be one-step labs in plain view. Based on his observations inside and outside of the trailer, Trooper White immediately contacted a KSP clean-up unit and obtained a search warrant for further investigation.”

Dixon was charged with manufacturing methamphetamine and related offenses. He moved for suppression, arguing “that the troopers had unlawfully exceeded the scope of the knock and talk by entering the protected curtilage of his residence.” During the hearing, photographs were shown of the area that indicated the back of the trailer was “overgrown with tall grass and trees, and it is littered with trash and other debris.” The trial court denied the suppression motion, applying “U.S. v. Dunn’s four-factor analysis and found, according to Trooper White’s uncontroverted testimony, that Trooper Smith walked around or outside of the trailer’s curtilage and thus the search was lawful.”<sup>32</sup> Dixon took a conditional guilty plea and appealed. Upon appeal, the Kentucky Court of Appeals reversed and remanded, looking at “Quintana v. Com., that the troopers did not have a right to venture away from the front of the house pursuant to a knock and talk and to invade the curtilage of Dixon’s residence when they stood 15 feet from his trailer.”<sup>33</sup> The Commonwealth appealed.

**ISSUE:** May a property be observed from outside the curtilage?

**HOLDING:** Yes

**DISCUSSION:** The Court began, noting that “because KSP ultimately obtained a search warrant based on the observations of Troopers White and Smith from behind Dixon’s trailer, the issue requiring resolution in this case is whether the troopers made those observations from a lawful vantage point.” The Court agreed that “‘search’ occurs for purposes of the Fourth Amendment when the government invades an individual’s reasonable expectation of privacy.”<sup>34</sup> A reasonable expectation of privacy in “curtilage,” which is the area immediately surrounding a house that “harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life.”<sup>35</sup> However, an individual has no reasonable expectation of privacy in an “open field,” the area outside a home’s curtilage.”<sup>36</sup>

In U.S. v. Dunn, the Court created the “four-factor analysis for determining protected areas:”

[C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

In California v. Ciraolo, the Court addressed lawful searches of curtilage.<sup>37</sup> In that case, it was not in dispute that the “place to be searched, i.e. a fenced-in backyard, was within the protected curtilage.” However, the Court held, the search was lawful when the area was observed “from an airplane flying in navigable airspace.” The Court “reasoned that the fact “[t]hat the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.” Further, in Florida v. Riley, which involved a helicopter in lower, but still legal, airspace, it noted that “the home and its curtilage are not necessarily protected from inspection that involves no physical invasion . .

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<sup>32</sup> 480 U.S. 294 (1987).

<sup>33</sup> 276 S.W.3d 753 (Ky. 2008),

<sup>34</sup> Smith v. Maryland, 442 U.S. 735, 739-40 (1979)

<sup>35</sup> Dunn, 480 U.S. at 300 (internal quotations omitted).

<sup>36</sup> “Open field” is a term of art. The term “may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither ‘open’ nor a field’ as those terms are used in common speech. For example, . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment.” Oliver v. U.S., 466 U.S. 170 (1984).

<sup>37</sup> 476 U.S. 207 (1986)

As a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be."<sup>38</sup>

In Quintana, the Court noted that "when an officer leaves the approach to the main entrance of a residence, a separate and distinct curtilage question arises." In that situation, the court must determine "separately whether the new area where the officer ventures is within the protected curtilage of the home." So, again, the Court must use the Dunn factors.<sup>39</sup> If that new "vantage point is within the curtilage, any observations may not be relied on as they are the product of an illegal search; however, if that vantage point is outside the curtilage, the officer is free to look into the curtilage in accordance with Ciraolo and Riley."

Applying the facts in this case, the Court agreed that although normally, 15 feet would have put the trooper within the curtilage, the context of the proximity in this case was telling. With respect to any enclosure, there was no fence, but that is not dispositive. The use of the location, in "tall, unmaintained grass," along with the description that the area was a "pigsty" and "basically a dumping ground," indicated that the land was not being used as an extension of the residence. The vantage point, however, was not clearly within that area, nor was it clear who was dumping items in that area, Dixon or others. There was no indication that anything had been done purposefully to secure the privacy of the area, although it was at a distance from any neighbors. The grass, although tall, did not shield the back of the property from view. In addition, the Court acknowledged Trooper White's unequivocal testimony that Trooper Smith "did not invade the curtilage."

The Court continued:

We are generally hesitant to be persuaded by such a conclusive statement from a witness. However, we cannot fault the trial court for relying on such testimony when it was uncontested and further, supported by the facts as outlined above. Dixon was free to attack this conclusion through cross examination or conflicting testimony but he failed to do so. He did not ask Trooper White to define his understanding of curtilage; he did not question Trooper White's line of sight; nor did he inquire as to how Trooper Smith proceeded to the vantage point. Perhaps more importantly, Dixon did not offer any testimony as to his use of the area in question nor any testimony regarding any affirmative steps he may have taken to secure its privacy.

The Court agreed that neither trooper encroached on the curtilage as such, all further actions were lawful as well. The Court reversed the Court of Appeals and reinstated the plea.

## **SEARCH & SEIZURE – INVENTORY SEARCH**

### **Cobb v. Com., 2016 WL 197127 (Ky. App. 2016)**

**FACTS:** Officer Smith (unidentified Graves County agency) spotted Cobb driving, and knowing he'd had a suspended OL just a few weeks before, suspected he might still not have a valid license. He followed Cobb until he pulled into a private driveway, park and get out. The officer asked his name and Cobb gave a false name, to which the officer indicated "you're not who I thought you were." Cobb entered the house, apparently not the house to which the driveway belonged. Officer Smith checked a photo for the name he'd been given, and realized that Cobb had lied. He knocked on the door and when Cobb came out, showed him the photo. Cobb admitted he'd lied and it was determined his license was still suspended. Cobb was arrested.

A neighbor emerged and explained that the vehicle was parked in the driveway of an elderly man in the hospital and that she didn't know Cobb. Smith arranged for an impound. (He later testified that it wasn't reasonable to allow Cobb to arrange for it to be moved, since he'd been caught driving illegally several times.) Officers Smith and Hammond searched the car and found drugs and a loaded handgun.

<sup>38</sup> 488 U.S. 445 (1989) (alteration in original) (quoting California v. Ciraolo, 476 U.S. 207 (1986)).

<sup>39</sup> U.S. v. Jenkins, 124 F.3d 768 (6th Cir.1997).

Cobb, a convicted felon, was charged with possession of the handgun. He moved for suppression and was denied. He took a conditional plea and appealed.

**ISSUE:** Is there an exception to the normal rule of towing only when necessary?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Wagner v. Com., in which it held that impoundment of a vehicle by the police is justified only under the following circumstances:

1. The owner or permissive user consents to the impoundment;
2. The vehicle, if not removed, constitutes a danger to other persons or property or the public safety and the owner or permissive user cannot reasonably arrange for alternate means of removal;
3. The police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent immediate impoundment the vehicle will be removed by a third party;
4. The police have probable cause to believe both that the vehicle contains evidence of a crime and that absent immediate impoundment the evidence will be lost or destroyed.<sup>40</sup>

However, it noted that there was continuing uncertainty as to the “extent to which Wagner was overruled by Estep v. Com.,” However, the Court found it unnecessary to examine that, as the impoundment did meet the Wagner ‘exception for matters of public safety.’” Since Officer Smith knew that Cobb had operated the vehicle multiple times without a license, it was proper to seize the car to prevent him from continuing to drive it without getting a valid OL. “Had he merely allowed Cobb to call a third party to get the car, there was no assurance that Cobb would not continue to drive without a valid permit. Under the facts of this case, the decision to impound falls squarely under the public safety exception in Wagner.”

Whether it was proven that that was parked in a lawful place, with permission, was uncertain, as it was unclear whether the caregiver who provided the information lived in the home, but the Court found that it was irrelevant. The inventory search was justified by the agency’s written policy and the officer “explained that the intent of the policy is to protect any items the owner may keep in the car, to make the tow truck driver aware of such items, and to prevent future disputes regarding any damage to the exterior of the vehicle.” (Smith was apparently not cross-examined on the issue.)

Smith’s plea was upheld.

#### **Davis v. Com., 484 S.W.3d 288 (Ky. 2016)**

**FACTS:** Deputy McCoy (McLean County SO) was on patrol with Chico, his K9 partner (narcotics). As Davis drove, by on a remote gravel road, McCoy followed him. He saw Davis’s vehicle weave several times and he initiated a traffic stop. When McCoy approached, he smelled alcohol from inside and saw an open beer can in the console. Davis said he’d just opened it and had drank about half of it. He readily passed FSTs and the PBT did not register alcohol. Davis refused to consent to a search of the car, stating several people had recently driven it and “he did not know what was in it.” Chico did a sniff around the car and alerted. Methamphetamine was found on Davis’s person after a thorough search. Within 13 minutes of the initiated of the stop, Davis was arrested. More drugs were found in the car.

Davis was questioned at the SO and admitted that he was involved in drug trafficking. He requested suppression and was denied. He then took a conditional guilty plea and appealed.

**ISSUE:** May a traffic stop be extended with reasonable suspicion?

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<sup>40</sup> 581 S.W.2d 352 (Ky. 1979).

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the initial stop was lawful and that ascertaining his degree of sobriety was proper. But, it noted, “the critical question is whether, after the field sobriety tests and McCoy’s personal observation of [Davis] substantially eliminated a legitimate concern about [his] sobriety, it was lawful to prolong the detention to enable Chico to perform the sniff search.” It continued, stating that “an officer cannot detain a vehicle’s occupants beyond completion of the purpose of the initial traffic stop unless something happened during the stop to cause the officer to have a reasonable and articulable suspicion that criminal activity [is] afoot.”<sup>41</sup> If prolonged, the “subsequent discovery of contraband is the product of an unconstitutional seizure.”<sup>42</sup> If done during the stop, however, it is lawful.<sup>43</sup>

As recently held in Rodriguez v. U.S., “a police officer may not extend a traffic stop beyond its original purpose for the sole purpose of conducting a sniff search – not even for a de minimus period of time.”<sup>44</sup> That holding emphasized the need for “additional reasonable suspicion” to extend the stop for a sniff. Rodriguez explained that a traffic stop entails issues related only to the traffic stop, and “a dog sniff, by contrast, is a measure aimed at detect[ing] evidence of ordinary criminal wrongdoing.” When the situation changes, it is no longer proper to extend the traffic stop, and the critical question is, did the sniff prolong the stop.

In this case, the length of time was not critical, what was important was whether the traffic stop was in fact, over. The Court noted that the issue wasn’t clearly resolved, as Deputy McCoy had suggested, at least, that he was trying to “resolve the lingering question of whether [Davis], if not driving under the influence of alcohol, was instead driving under the influence of drugs.” However, the problem was, nothing in his “speech, demeanor, or behavior otherwise exhibited any characteristics associated with drug or alcohol intoxication from which an officer might reasonably believe further investigation was necessary.” Without an articulable suspicion, at the least, no further investigation was warranted. Nor was it inevitable that the evidence would have been discovered, since was not, and could not, have been arrested for any offense.<sup>45</sup> As such, a search incident to arrest would not have been possible.

The Court vacated the conviction.

## **SEARCH & SEIZURE – CARROLL**

### **Dalton v. Com., 2016 WL 1069137 (Ky. App. 2016)**

**FACTS:** On January 16, 2013, Deputy Keefer (Lawrence Co. SO) was on patrol. He noted that the vehicle driven by Dalton had a license plate not illuminated, so he made a traffic stop. As he approached, he saw the front-seat passenger was hiding something under the seat. Dep. Keefer spoke with Dalton, the driver, and saw her to be nervous, with “glassy eyes and slurred speech.” He believed she was under the influence of drugs or alcohol.

At the deputy’s request, she got out and emptied her pockets onto the hood of the cruiser. Among other items, a cell phone was seized. He secured her in the cruiser and spoke to the two passengers, who were also instructed to empty their pockets. Childers was in the front passenger seat and Parrigan was in the back seat. Both consented to a vehicle search, but Dalton was not asked. The two passengers were also secured in the cruiser.

Deputy Keefer searched the vehicle and found pills in a container under Childers’s seat and pills in a separate container located between Childers’s seat and the middle console. These pills were later identified as a combination of Oxycodone and Alprazolam (Xanax). One hundred and eight

<sup>41</sup> Turley v. Com., 399 F.3d 345 (6<sup>th</sup> Cir. 2005); U.S. v. Davis, 430 F.3d 345 (6<sup>th</sup> Cir. 2005).

<sup>42</sup> Eps v. Com., 295 S.W.3d 807 (Ky. 2009).

<sup>43</sup> Johnson v. Com., 179 S.W. 3d 882 (Ky. App. 2005).

<sup>44</sup> 135 S.Ct. 1609 (2015)

<sup>45</sup> The Court suggested that he could have been arrested for reckless driving, but under the law at this time, an arrest would not have been warranted.

Oxycodone pills and four Xanax pills were seized. Deputy Keefer also seized a cell phone that was found on the middle console between the two front seats, a global positioning (GPS) unit on the dashboard, and a small tablet. Deputy Keefer also seized two syringes found in a black bag in the back seat of the vehicle and three notebooks. The black bag also contained toilet paper and clothes. Appellant's and Childers's wallets were searched and revealed various medical business cards. Handwritten notations of appointment dates and times appeared on these cards. Deputy Keefer observed that there was information about medical offices and pharmacies from locations spanning a wide distance, from Maryland to Texas. Additionally, a total of \$1,619 in cash was recovered from the three individuals.

Two phones were seized in the process: the one Dalton removed from her pocket and a second one located in the center console. A search warrant was obtained for each and text messages on both phones that indicated illegal drug transactions.

Dalton and Childers were each indicted for trafficking in the various substances found as well as related charges. Dalton moved for suppression and was denied. On the morning of trial, Dalton (and Parrigan) moved to sever the trial because Childers allegedly made an inculpatory statement. "At a hearing on that motion, the parties revealed that three days prior to the trial, the Commonwealth disclosed a recently discovered statement by Childers to Deputy Keefer on the night of the arrest claiming ownership of the pills found in the vehicle. Deputy Keefer had initially not reported the statement because he believed it was inadmissible." The Court granted that as to Parrigan, but denied it for Dalton's because of the cell phone evidence.

Both Dalton and Childers were tried together, and convicted of Trafficking and related charges. Dalton appealed.

**ISSUE:** May a vehicle be searched on probable cause?

**HOLDING:** Yes

**DISCUSSION:** First, the Court addressed the search of the car. The trial court had determined that the deputy's search of the car was supported by probable cause.<sup>46</sup> The Court noted that the "automobile exception applies when there is probable cause to believe an automobile contains evidence of criminal activity and the automobile is readily mobile."<sup>47</sup>

An inquiry into whether the automobile exception applies necessarily requires determining whether the stop of the vehicle was justified. "Stopping an automobile and detaining its occupants constitutes a seizure under the Fourth Amendment. Traffic stops are similar to Terry stops and must be supported by articulable reasonable suspicion of criminal activity."

The stop was premised on a non-illuminated license plate, a violation of Kentucky law.<sup>48</sup> Upon observation of Dalton, the driver, the deputy developed probable cause that she was DUI, and that was sufficient for him to have probable cause to believe drugs would be located in the vehicle.

Second, Dalton argued that she was denied a fair trial by being tried jointly with Childers. She was not allowed to cross-examine Deputy Keefer about the "alleged inculpatory statement" made by Childers, as it was believed to be not admissible against him, and she argued she should have been permitted to sever the trial and have the statement admitted at her solo trial.

The Court noted that "on the Friday before trial, after business hours, the Commonwealth disclosed that it had been discovered Childers made a statement to Deputy Keefer on the night of his arrest,

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<sup>46</sup> Gray v. Com., 28 S.W.3d 316 (Ky. App. 2000).

<sup>47</sup> Chavies v. Com., 354 S.W.3d 103 (Ky. 2011).

<sup>48</sup> KRS 186.170.

which the Commonwealth had not previously turned over to the defense.<sup>49</sup> Responding to Deputy Keefer's statement that he was going to arrest all three ([Dalton], Childers, and Parrigan), Childers told Deputy Keefer that all of drugs found in the car belonged to him." The Court agreed that although joint trials are permitted, and that "antagonistic defenses, including defendants casting blame on each other, standing alone, are not unfairly prejudicial and do not invariably mandate separate trials." However, when the statement was not disclosed in a timely manner, it did unduly prejudice Childers, and by extension, Dalton as well.

The Court reversed Dalton's conviction and remanded her case.

## **SEARCH & SEIZURE – VEHICLE SEARCH**

### **Smith v. Com., 2016 WL 304623 (Ky. App. 2016)**

**FACTS:** On August 12, 2013, Officer Lusardi (Covington PD) stopped Smith for driving with no headlights. Smith also stopped in the middle of the intersection when the light was green. Upon approach, he found Smith to be "highly disoriented," with "severely slurred speech, and bloodshot and glassy eyes." He also smelled marijuana and saw an open bottle of beer in the console. A DUI specialist officer gave Smith FSTs, which he failed to perform successfully, he refused a blood test and was agitated. He was charged with DUI.

Officer Lusardi, a K-9 officer, walked his dog around the car. The dog was nationally certified and trained to detect drugs, including marijuana. The dog alerted on the driver's side and the rear seat back. Officers searched the passenger compartment and opened the trunk simultaneously. Inside a box in the trunk, marijuana was found. Smith moved to suppress the trunk search, but the Court held it admissible under the automobile exception. Smith took a conditional guilty plea to Trafficking in Marijuana and appealed.

**ISSUE:** May officers search a vehicle on probable cause?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the legitimacy of using the automobile exception starts with determining whether the stop of the vehicle was justified. In this case, it was well-justified. Once the vehicle was stopped in a public place, "the officers could lawfully search the entire vehicle and seize all evidence if probable cause existed to believe his vehicle contained evidence of criminal activity and was 'readily mobile.'"<sup>50</sup> Further, "when police have probable cause to believe a car contains evidence of criminal activity, they may search the entire vehicle, including areas that are not in plain view."<sup>51</sup> Under U.S. v. Ross, the Court agreed that if "probable cause justifies the search of the lawfully stopped vehicle, it justifies the search of every part of the vehicle and the contents that may conceal the object of the search."<sup>52</sup> The court agreed that the facts available to the officer more than supported probable cause that there were drugs in the vehicle. Further, the Court agreed that under Chavies, even though he was locked in the police car, that the vehicle was still mobile. The Court upheld his plea.

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<sup>49</sup> The Commonwealth explained that it did not intentionally keep the statement from the defense, but rather had only recently learned about it from Deputy Keefer. Apparently, Deputy Keefer had failed to disclose the statement to the prosecution team because he did not believe that it would be admissible at trial. Nevertheless, deputies and investigators are agents of the Commonwealth and any statements taken by them are in the possession of the Commonwealth, regardless of whether the Commonwealth's Attorney is personally aware of them. Anderson v. Com., 864 S.W.2d 909 (Ky. 1993). 663 S.W.2d 213 (Ky. 1983)."

<sup>50</sup> Pennsylvania v. Labron, 518 U.S. 938 (1996).

<sup>51</sup> Chavies, *supra*.

<sup>52</sup> 456 U.S. 798 (1982); U.S. v. Burnett, 791 F.2d 64 (6<sup>th</sup> Cir. 1986).

## **Dudley v. Com., 2016 WL 194785 (Ky. App. 2016)**

**FACTS:** In September, 2004, Sgt. Holstein (Covington PD) received anonymous tips about a specific vehicle being involved in drug trafficking. He began watching the car. On September 6, he spotted it and requested Officers Pennington and Valente also follow it. When the officers observed a minor traffic offense, they called for a marked unit to make a traffic stop.

Spc. Ernst, along with Orry, a K-9, made the stop. Knowing that the driver was likely carrying a weapon, he had the driver get out and walk backwards to him. Dudley produced his license and was frisked, nothing was found. Garcia, a female passenger, was released after being found clear of warrants. Orry was walked around the vehicle and alerted. Dudley refused consent to a search. “After Dudley signed a refusal of consent to search, he was allowed to leave” - and the Camaro was impounded pending a search warrant.

A warrant was obtained the next day, and the ensuing search uncovered cocaine, a digital scale, a black mask, and a handgun.” Dudley was arrested the next day, but was released after 90 days because his charges had been pending too long under Kentucky procedural rules. He was indicted for possession of the drugs and the gun, since he was a convicted felon. Ultimately, he was arrested in 2011 in Ohio and returned to Kentucky under the IAD. He moved for suppression which was denied. He was convicted and appealed.

**ISSUE:** May a stop be made on a minor traffic infraction?

**HOLDING:** Yes

**DISCUSSION:** Dudley first argued that “his traffic stop was unreasonable because it was predicated on an unreliable anonymous tip.” The Court agreed that it was “well-settled that an officer who has probable cause to believe a civil traffic violation has occurred may stop a vehicle regardless of his or her subjective motivation.”<sup>53</sup> Officer Pennington’s report indicates that officers stopped Dudley because he made a turn without signaling. Thus, in light of Dudley’s traffic violation, the traffic stop was valid. The subjective intent of the officers does not make the otherwise valid stop invalid.” The Court also agreed, however, that a “a stop that is justified at its inception must last no longer than is reasonably necessary to effectuate the purpose of the stop.”<sup>54</sup> Without reasonable suspicion, it is not allowed to extend a traffic stop for a dog-sniff.<sup>55</sup> It is, however, allowed during the duration of a regular stop.<sup>56</sup> The Court noted there was discrepancy over the length of time involved in the stop, with Dudley stating it took from 9:45 to 11:14, and the police stating it went from 10:41 to 11:14, but noted that the officer’s testimony was corroborated by other documentation. Since Orry was with the officer when he responded to the call, and the dog-sniff occurred during the course of the original stop, there was no delay. Once Orry alerted, the officers had probable cause and any subsequent detention was immaterial to the issue.

With respect to testimony that the gun was “loaded and cocked” when found, the Court agreed that was properly admitted and related to the charge offense of possession of the handgun. The Court noted that “in Com. v. Jones, our Supreme Court held that in a prosecution of possession of a firearm by a convicted felon, the firearm is presumptively functional,” so it was unnecessary to prove that it was in fact, functional and while that evidence should not have been admitted (as it wasn’t probative of any material fact,) it was harmless error to introduce it.”<sup>57</sup>

The case was partially overturned for unrelated procedural issues, but the traffic stop was upheld.

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<sup>53</sup> Wilson v. Com., 37 S.W.3d 745 (Ky. 2001).

<sup>54</sup> Johnson v. Com., 179 S.W.3d 882 (Ky. App. 2005); Epps v. Com., 295 S.W.3d 807 (Ky. 2009).

<sup>55</sup> Rodriguez v. U.S., 135 S.Ct 1609 (2015).

<sup>56</sup> Com. v. Buccalo, 422 S.W.3d 253 (Ky. 2013)

<sup>57</sup> 283 S.W.3d 665 (Ky. 2009).

## **Jennings v. Com., 2016 WL 447754 (Ky. App. 2016)**

**FACTS:** On March 16, 2011, Officer Dunn (Newport PD) “observed Jennings’s vehicle at 1:15 a.m. when he drove it past an entrance to a liquor store and stopped at a traffic light.” He then backed up, into oncoming traffic, for about a half-block, and turned into the liquor store with signaling. Dunn followed, finding Jennings in the drive-through, so he elected to wait until Jennings pulled out of the lot. Sgt. Day responded to backup and ultimately, he made the actual stop. Officer Dunn took over, however. He spoke to the driver, Jennings, while Day spoke to the female passenger. Officer Dunn could smell alcohol but saw nothing in the vehicle, so he asked Jennings to step out. Instead, Jennings “reached to his right behind the front passenger seat.” Officer Dunn was concerned and ordered Jennings out, where he was handcuffed and frisked. He asked for consent to search and was denied.

In the meantime, Sgt Day spotted a clear cup (matching what was provided by the liquor store) with liquid in the console, and also smelled alcohol. The passenger admitted the cup was heard and got out of the vehicle upon request. “When Sergeant Day reached in to retrieve the cup, he noticed another cup of partially spilled liquor on the passenger floorboard and that the carpet was wet. It, too, smelled of alcohol. He then moved the passenger seat forward and saw a handgun under the seat.” He later stated he was looking for an open container of an alcoholic beverage.

The passenger was cited for Open Container and allowed to leave. Only then did Sgt. Day learn that Jennings had denied consent. Jennings was not charged for possessing alcohol, but was charged for the firearm (as he was a convicted felon) and paraphernalia (a digital scale). Jennings moved for suppression and the trial court denied the motion, citing Arizona v. Gant.<sup>58</sup> Following this line of reasoning, the trial court held that the officers had probable cause to stop Jennings’s vehicle and probable cause to search the passenger compartment for evidence of an open container violation.

Jennings took a conditional plea and appealed.

**ISSUE:** May a vehicle be searched on probable cause?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that:

A well-established exception to the warrant requirement is the automobile exception, articulated originally in Carroll v. U.S.,<sup>59</sup> which allows a warrantless search of an automobile based on probable cause to believe it contains contraband. The automobile exception to a warrantless search allows officers to search a legitimately stopped automobile when probable cause exists that contraband or evidence of a crime is in the vehicle.<sup>60</sup>

If a search is justified under Carroll, a search of the entire vehicle, where the object of the search could be concealed, is also justified. Kentucky “adopted the automobile exception to the warrant requirement in Clark v. Com..”<sup>61</sup> Further, a traffic stop is held to the same standard as a Terry stop, “and must be supported by articulable reasonable suspicion of criminal activity.”<sup>62</sup>

In addition, in Arizona v. Gant, the Court acknowledged the automobile exception to the search warrant requirement, when it is reasonable to believe that the vehicle contains evidence of the offense or there is, “probable cause to believe a vehicle contains evidence of criminal activity, U.S. v. Ross authorizes a search of any area of the vehicle in which the evidence might be found. ....”<sup>63</sup> Ross allows searches for

<sup>58</sup> 556 U.S. 332 (2009). Gant discusses the automobile exception and held that a warrantless search of a vehicle is justified when it is reasonable to believe evidence relevant to the crime may be found in the vehicle.

<sup>59</sup> 267 U.S. 132 (1925).

<sup>60</sup> U.S. v. Ross, 456 U.S. 798 (1982) (citations omitted); Estep v. Com., 663 S.W.2d 213 (Ky. 1983).

<sup>61</sup> 868 S.W.2d 101 (Ky. 1993), overruled on other grounds by Henry v. Com., 275 S.W.3d 194 (Ky. 2008).

<sup>62</sup> Berkemer v. McCarty, 468 U.S. 420 (1984) (citing Terry v. Ohio, 392 U.S. 1 (1968)).

<sup>63</sup> 456 U.S. 798 (1982).

evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader.” The Kentucky Supreme Court adopted the Ross standard in Estep.

Looking at KRS 189.530, the Court noted that the offense in question is a violation, and not a crime, and as such, there was not crime implicated. “Alcohol, under the facts in this case, is not contraband. The automobile exception permits an officer to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime may be in the vehicle. The search may be as thorough as a magistrate could authorize via a search warrant, including all compartments of the automobile and all containers in the automobile which might contain the object of the search.”<sup>64</sup>

In this case, there was no legal need to find the bottle, as the offense was complete when Sgt. Gay determined the cup contained an alcoholic beverage. As such, the “search should have stopped at that point,” and the gun was not in plain view at the time. The Court reversed the denial of the motion to suppress and remanded the case.

## **SEARCH & SEIZURE – ROADBLOCK**

### **Pulley v. Com., 481 S.W.3d 520 (Ky. App. 2016)**

**FACTS:** On August 31, 2012, KSP was conducting a traffic safety checkpoint in Livingston County. The location was on Highway 60, on a “portion of the highway is not situated near any homes, businesses or other places where people are likely to be present.” They stopped each motorist and checked paperwork. Trooper Fields was stopping traffic going in one direction, with Lt. White stopping traffic in the other direction.

The checkpoint started about 9:30 p.m. and Pulley was stopped shortly thereafter. In the car, as well, were his wife, Kathy and toddler son. Trooper Fields examined his paperwork and returned them, and then noticed Pulley’s handgun on the center console arm rest. When asked, Pulley agreed it was his firearm, and was ordered from the car. Fields reached in and removed the firearm. (He later testified that he’d not yet finished the stop when this occurred.) Pulley denied permission for Fields to check the firearm’s registration, but did pull his vehicle to the side of the road as ordered. Trooper Fields later testified that had he not seen the firearm, he would not have continued the stop. He checked the vehicle’s registration and the handgun’s serial number, as well as Pulley’s license, all of which indicated Pulley was fully in compliance with the law. Fields unloaded the firearm, handed it to Kathy and told her not to reload it until they left. (There was discrepancy in how long this process took.) Pulley asked Trooper Fields for his name and badge number, intended to make a formal complaint. Fields provided the information but also directed Pulley to Lt. White.

After Pulley stated he wanted to speak with Lt. White, Trp. Fields took the firearm back from Pulley, and crossed the highway to speak with Lt. White. The checkpoint was temporarily halted at this time. Both officers crossed back over. Lt. White approached and asked Pulley to exit the vehicle and they proceeded to talk by the trunk of the vehicle while Trp. Fields remained by Kathy on the passenger side.

Although initially, the conversation between Pulley and Lt. White was calm, it became more heated when Lt. White insisted what had occurred was legal. “Pulley and Lt. White both testified that Lt. White told Pulley it was the KSP’s practice to run checks on any firearm encountered to determine if it was stolen and such practice was proper.” The argument escalated and became loud and Lt. White ordered Pulley to put his hands on the trunk. Pulley did so but continued to argue, removing his hands several times. (Pulley was described as “agitated and arguing loudly while acting in an aggressive manner.”) Lt. White then handcuffed Pulley to “calm him down,” but told him he was not under arrest. Eventually, however, he was placed under arrest, at 9:50 p.m. At that point, the checkpoint ended. Kathy, who could heard

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<sup>64</sup> Gray v. Com., 28 S.W.3d 316 (Ky. App. 2000).

parts of the exchange, later testified that Lt. White was the louder of the two. At some point, another motorist stopped but was waved on by Lt. White.

Pulley was charged with menacing and disorderly conduct, but was convicted only of the latter. He appealed.

**ISSUE:** Is possession of a firearm, lawfully, sufficient to extend a stop?

**HOLDING:** No

**DISCUSSION:** Pulley argued that his “his roadside detention was illegally extended because police had no reasonable suspicion that he was unlawfully possessing his firearm.” The Court looked to section one of the Kentucky Constitution, where people are declared to “have certain inherent and inalienable rights[.]” These include: “Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.”

As interpreted by Kentucky Courts, this right “is an exemplification of the broadest expression of the right to bear arms.”<sup>65</sup> In Kentucky, a person has the right to carry a firearm openly and, so long as the firearm is in full view, no one may question the person’s right to do so. *Id.* Bearing an unconcealed weapon is not an offense.<sup>66</sup> Vehicle owners may “transport weapons unconcealed in the front seat . . . of the motor vehicle.”<sup>67</sup> The presence of Pulley’s unconcealed firearm on top of the center console inside his vehicle was entirely legal.“

The Court also looked to the law surrounding traffic safety checkpoints.<sup>68</sup>

For a checkpoint to be constitutional, it must be executed pursuant to a systematic plan, and the officers conducting the stop should not be permitted to exercise their discretion regarding specifically which vehicles to stop.”<sup>69</sup> “[I]nherent in all constitutional checkpoints is constrained discretion of officers at the scene[.]”<sup>70</sup> Among the factors to be considered in determining the reasonableness of the stop is the length and intrusiveness of the stop:

Motorists should not be detained any longer than necessary in order to perform a cursory examination of the vehicle to look for signs of intoxication or check for license and registration. If during the initial stop, an officer has a reasonable suspicion that the motorist has violated the law, the motorist should be asked to pull to the side so that other motorists can proceed.<sup>71</sup> “The scope of activities permitted during an investigative stop is determined by the circumstances that initially justified the stop.”<sup>72</sup> Any additional investigation conducted must be “reasonably related in scope to the circumstances that justified the interference in the first place.”<sup>73</sup> “[A]ny subsequent detention is only constitutionally permissible if the officers had probable cause or reasonable suspicion to warrant prolonging the stop.”<sup>74</sup>

Further, the Court looked to KSP’s policy, with authorized checkpoints only for issues of “motor vehicle equipment safety, licensing of drivers, registration of motor vehicles and operating motor vehicles while intoxicated.” It specifically does not allow a stop to be extended for an

<sup>65</sup> *Holland v. Com.*, 294 S.W.2d 83, 85 (Ky. 1956).

<sup>66</sup> *Skidmore v. Com.*, 311 Ky. 176, 178, 223 S.W.2d 739, 740 (1949).

<sup>67</sup> *Mohammad v. Com.*, 202 S.W.3d 589, 590 (Ky. 2006).

<sup>68</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Singleton v Com.*, 364 S.W.3d 97 (Ky. 2012).

<sup>69</sup> *Smith v. Com.*, 219 S.W.3d 210 (Ky.App. 2007).

<sup>70</sup> *Com. v. Buchanan*, 122 S.W.3d 565 (Ky. 2003), as amended (2004).

<sup>71</sup> *Id.* at 571. See also *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion); *Turley v. Com.*, 399 S.W.3d 412 (Ky. 2013); *Epps v. Com.*, 295 S.W.3d 807 (Ky. 2009).

<sup>72</sup> *U.S. v. Obasa*, 15 F.3d 603 (6th Cir. 1994).

<sup>73</sup> *Epps*, 295 S.W.3d at 812 (citations omitted).

<sup>74</sup> *Com. v. Bucalo*, 422 S.W.3d 253 (Ky. 2013). See *Palmore v. U.S.*, 290 A.2d 573 (D.C. 1972), *aff’d* 411 U.S. 389 (1973).

unconcealed firearm in a vehicle. Although Terry v. Ohio was argued, the court noted that when having such an unconcealed firearm is legal, “the mere observation or report of an unconcealed firearm cannot, without more, generate reasonable suspicion for a Terry stop and the temporary seizure of that firearm.”<sup>75</sup>

A firearm when combined with other innocent circumstances cannot generate reasonable suspicion because “it [is] impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.”<sup>76</sup> A legally carried firearm does not equate to an individual being armed and *dangerous*.

Once Pulley’s documents were returned to him, “the purpose of the traffic safety stop was complete and Pulley should have been allowed to proceed.” Even though the initial detention was brief, it was not constitutionally permissible when the “purpose of the stop was changed into an investigation for general crime control.” There was simply no justification for any further investigation.

If, however, Pulley’s discussion with Lt. White was purely consensual, what occurred next could be attenuated from the initial detention. However, when Trooper Fields again removed the firearm, the Court noted that it would not be expected that an individual would abandon a possession, and as such, Pulley was detained again. However, in the unusual posture of this case, Pulley was seeking suppression of all evidence of a future crime (the disorderly conduct) that occurred after his weapon was seized.

The Court moved on, however, to determine if the Disorderly Conduct charge was itself proper. KRS 525.060 requires that Pulley’s conduct have been done with any intent or wanton state of mind to cause public inconvenience, annoyance or alarm. Although it was a public location, the only persons present were the two troopers and Pulley’s own family, not members of the public.<sup>77</sup> There was no indication of the state of mind of the people in the one vehicle that did briefly stop.

Pulley’s conviction was overturned.

## **SEARCH & SEIZURE – GPS TRACKING**

### **Thornton v. Com., 2015 WL 10376169 (Ky 2015)**

**FACTS:** Thornton was involved in a series of robberies dating back to 2001, in Jefferson County, although he was only tried for robberies that occurred in 2008. After several years, Louisville Metro PD considered Sneed a suspect. They placed a GPS tracking device on Sneed’s vehicle, without a warrant, and did the same with his girlfriend’s (Starks) vehicle. Sneed’s vehicle was tracked to Thornton’s residence, so he too became a suspect. The GPS signal caught Thornton and Sneed in the act of their final robbery, leading to two separate high speed chases and Sneed being fatally shot by police. Thornton was charged with numerous offenses, including seven counts of Robbery 1<sup>st</sup>. He was convicted and appealed.

**ISSUE:** Does one have an expectation of privacy in a vehicle one has permission to drive?

**HOLDING:** No

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<sup>75</sup> Northrup v. City of Toledo Police Dept., 785 F.3d 1128 (6th Cir. 2015); U.S. v. Black, 707 F.3d 531 (4th Cir. 2013); U.S. v. Lewis, 672 F.3d 232 (3d Cir. 2012); U.S. v. Ubiles, 224 F.3d 213 (3d Cir. 2000); State v. Williamson, 368 S.W.3d 468, 480-81 (Tenn. 2012); St. John v. McColley, 653 F.Supp.2d 1155 (D. N.M. 2009); U.S. v. Dudley, 854 F.Supp. 570 (S.D. Ind. 1994).

<sup>76</sup> U.S. v. Smith, 263 F.3d 571 (6th Cir. 2001) (quoting Karnes v. Skrutski, 62 F.3d 485 (3d Cir. 1995) (abrogated on other grounds)). See Black, 707 F.3d at 540 (openly bearing a firearm where it is legal to do so, in a high crime area, cannot justify reasonable suspicion).

<sup>77</sup> See Kennedy, 635 F.3d at 215-16 (police officer and city workers were not members of the public); Nails v. Riggs, 195 F.App’x 303 (6th Cir. 2006)

**DISCUSSION:** Thornton argued that he was denied standing by the trial court to challenge the GPS tracking of a vehicle that he had permission to drive. The trial court, in fact, simply found he had no expectation of privacy in the vehicle and that he did not have a possessory interest in the vehicle that protected him against trespass.<sup>78</sup> The Court noted that Jones was decided under a trespass theory and that since there was no trespass in Hedgepath v. Com.,<sup>79</sup> in which a cell phone was pinged to determine its location, a trespass was inherent in a Jones claim. Thornton did not own the vehicle in question, nor was he an exclusive driver of it. The vehicle was not in his control when the device was attached.

However, the Court also looked at the situation under the Katz<sup>80</sup> reasonable-expectation-of-privacy test. The Court noted that the vehicles were under a geofence, in which the investigators were notified when either of the vehicles left that location. They tracked the vehicles several times, and ultimately, attempted to apprehend both men. The Court found U.S. v. Knotts<sup>81</sup> instructive, which held that monitoring a tracking device was not invasive of privacy, since visual surveillance would have given them the exact same information.

The Court upheld his convictions.

## **SEARCH & SEIZURE – VEHICLE**

### **Wilson v. Com., 2016 WL 1178533 (Ky. App. 2016)**

**FACT:** On May 13, 2014, “Wilson and her boyfriend drove to the Harrodsburg police department where they had an altercation in the front lobby.” Both were arrested and found to be in possession of methamphetamine. Wilson’s car, parked outside, was searched and towed. She subsequently pled guilty to the drug charge, but moved the court to have her vehicle returned without having to pay the impoundment fee – the car having been held for a number of months. At a hearing, the Court heard a recording of her interview with an officer in which she was told the vehicle was being towed. It was undisputed that it was towed simply because it was unattended. The trial court concluded it was not evidentiary and that it lacked jurisdiction to order the return of the car. Wilson appealed.

**ISSUE:** Is a vehicle being searched necessarily also seized?

**HOLDING:** No

**DISCUSSION:** Wilson argued that when the police searched the vehicle, they took custody of it, and “thus the vehicle was seized.” She further argued that once they concluded the vehicle was not evidence, the court had jurisdiction to order it returned. The Court ruled that a limited investigation of the vehicle did not cause the vehicle to fall under the jurisdiction of the police. In fact, the evidence indicated that the vehicle was towed because it was presumed abandoned. In fact, Wilson asked if her grandfather could fetch the vehicle and she was told that her grandfather could get it at the tow location. Her argument that the tow company did not comply with KRS 376.275 was a civil matter that she could pursue separately, in a civil matter.

## **INTERROGATION**

### **Day v. Com., 2016 WL 1178577 (Ky. App. 2016)**

**FACTS:** In September, 2011, Scott County deputies “began noticing that pills and money were missing from the narcotics safe.” They brought it to the Sheriff’s attention. Lt. Day and Lt Porter were equally seconds-in-command with the Sheriff’s office. Sheriff Hampton learned that Day had obtained the combination of the safe from one of the deputies working narcotics. Surveillance video

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<sup>78</sup> U.S. v. Jones, 132 S. Ct. 945 (2012)]

<sup>79</sup> 441 S.W.3d 119 (Ky. 2014),

<sup>80</sup> Katz v. U.S., 389 U.S. 347 (1967).

<sup>81</sup> 460 U.S. 276 (1983),

showed Day “moving the surveillance camera away from its intended position on five separate occasions.” Sheriff Hampton asked KSP to investigate.

Lt. Porter called Lt. Day to the Sheriff’s office. The Sheriff relieved him of his gun and directed him that KSP was there to talk to him. Day was interviewed by KSP but not given Miranda. He admitted he’d moved the camera and taken the drugs. Sheriff Hampton and Lt. Porter returned and Day’s gun was returned. Day apologized for what he’d done. Neither the Sheriff nor Porter asked him any questions.

Day was indicted for multiple counts of theft of a controlled substance and theft. He sought to suppress the statements, which was denied. He took a conditional guilty plea to one charge and appealed.

**ISSUE:** Is an officer entitled to Miranda when being questioned, even if not in custody?

**HOLDING:** No

**DISCUSSION:** Day argued that his statements should have been suppressed under KRS 15.520 and under Miranda. Under Miranda, the Court agreed, the warning and subsequent rights only attach when the individual is “in custody,” and he was not. With respect to KRS 15.50, Day argued that at the time, he was entitled to “receive a Miranda warning prior to his meeting with the detectives and his colleagues, without a showing that he was in custody, because he was a suspect in a criminal investigation.” The Court noted that the due process protections of the statute were for officers facing administrative discipline. However, the Court agreed that if the interview was suppressed, “Day would indeed be provided with a shield against criminal prosecution that is not available to the general public.” Since he chose not to challenge the issue of whether he was in custody at the time, the Court affirmed the trial court’s decision.

#### **Leverich v. Com., 2016 WL 354329 (Ky. App. 2016)**

**FACTS:** On November 16, 2012, Amber reported that her father, Leverich, had been touching her inappropriately. The school notified Louisville Metro PD, and Det. Lucas was assigned. She contacted Leverich and asked if she could talk to him at his home – he agreed.

Det. Lucas, along with Det. Boyer and Eichem, a CPS social worker, arrived for the interview. Lucas informed Leverich that he was not under arrest and that they would leave if he requested. He was not given Miranda. During the 45 minute interview, he made “several incriminating statements” – the officers then left. A few weeks later, he was indicted on three counts of Sexual Abuse 1<sup>st</sup>. He moved to suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is an interview at home normally considered non-custodial?

**HOLDING:** Yes

**DISCUSSION:** All parties agreed that Leverich was interrogated and was not given Miranda. As such, the only issue was whether he was in custody at the time. The Court agreed that “the inquiry for making a custodial determination is whether the person was under formal arrest or whether there was a restraint on his freedom or whether there was a restraint on freedom of movement to the degree associated with formal arrest.”<sup>82</sup> Further, “custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual.”<sup>83</sup> The determination was to be based on the objective circumstances of the situation. The Court agreed that the facts indicated that the questioning was voluntary and objectively non-coercive, and that it was also not a police-dominated atmosphere.

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<sup>82</sup> Lucas, 195 S.W. 3d

<sup>83</sup> Smith v. Com., 312 S.W.3d 353 (Ky. 2010).

Det. Lucas did the majority of the interrogation with the other two simply present for the most part. The overall situation was very cooperative and the Court found nothing to indicate coercion.

The Court upheld his plea.

**O'Neal v. Com., 2016 WL 837073 (Ky. App. 2016)**

**FACTS:** Dets. Spaulding and King (Louisville Metro PD) received information that Adkins, wanted on outstanding felony warrants, would be found at a particular address. As they observed the house, they spotted Adkins, who had been on the front porch, enter the house. The officers summoned backup and knocked. O'Neal opened the blinds and Det. Spaulding could see a "black handgun resting on a white fireplace mantle[sic] in an unfurnished room." When O'Neal opened the door, the detectives advised him that they'd just seen Adkins and that she was wanted on warrants. O'Neal allowed them to enter. He was asked about the gun and confirmed it was his, and that he was a convicted felon.

Adkins and Bruce were located, along with Simpson, and everyone was checked for warrants. The officers confirmed that O'Neal was a convicted felon and he was charged with possession of the gun. O'Neal moved to suppress the statement he'd made, initially, "as the product of an un-Mirandized custodial interrogation." He was denied and then, convicted at trial. He appealed.

**ISSUE:** Is being questioned at home, and not confined in any way, custodial?

**HOLDING:** No

**DISCUSSION:** O'Neal confirmed that when he was questioned, he was not handcuffed or otherwise restrained, but he was not told he was "free to leave." The Court looked to Com. v. Lucas, in which it addressed the custody prong on Miranda.<sup>84</sup> In this situation, the Court concluded, O'Neal was simply not in custody and there was "no evidence of physical intimidation, coercion, threatening behavior, or restraint of movement that would indicate" he was in custody.

The Court affirmed his conviction.

**SUSPECT IDENTIFICATION**

**Isaac v. Com., 2016 WL 1068614 (Ky. 2016)**

**FACTS:** On November 12, 2013, Isaac, Gillespie and McNeil gathered to play poker. Isaac and Gillespie arrived together on a four-wheeler. They remained at the house when McNeil left. The next day McNeil spotted the pair again, still dressed in the same clothing as the night before, with both men wearing face masks and scarves. When he last saw them, Isaac was driving the four wheeler. France, another witness, spotted them later in the day and also described their clothing.

At about 9:38 a.m., the two arrived at a bank in Virgie. Gillespie entered, brandishing a revolver. Reynolds, Robinson, Osbourne and Bartley (a customer) were present. Gillespie demanded money from Robinson while holding his gun on Bartley. Robinson gave him between 8 and 9 thousand dollars, along with \$200 he grabbed from Bartley. He then left. Robinson gave a description of the robber's clothing.

McNeil heard about the robbery through his scanner and contacted (and later met with) Det. Tackett (KSP). He watched the surveillance video and identified the two men as wearing the same clothing Isaac and Gillespie had been wearing. Later that day, Isaac entered a market near Wheelwright and his attire was noted by Hall, who thought he was oddly dressed and "almost entirely covered to such an extent that she could barely see his eyes." She also identified Isaac as the driver of the four-wheeler. Her husband, seeing him on surveillance footage, also recognized him.

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<sup>84</sup> 195 S.W.3d 403 (Ky. 2006).

Isaac was charged with Robbery 1<sup>st</sup>, Theft and related charges. He was convicted and appealed.

**ISSUE:** May a witness make an in-court identification when they have not previously made any form of identification?

**HOLDING:** Yes

**DISCUSSION:** Among other procedural issues, Isaac argued that he was prejudiced by Bartley making an in-court identification of Gillespie. He argued that “the identification should have been barred due to the unreliable nature of courtroom identification, lack of proper foundation, lack of any prior identification of Gillespie by Bartley, and because the identification caused him undue prejudice.” The Court agreed that his reliance on Neil v. Biggers was misplaced because it only applies to pretrial confrontation situations.<sup>85</sup> Bartley testified that she had not seen any photos of Gillespie nor had she seen him. The Court upheld the identification.

Isaac also argued that he was entitled to a lost or missing evidence instruction, as video from his visit to the market was not available. Although a copy was sent to KSP, they realized that it was for the wrong time period and by that time, the correct time period had already been erased. The Court found “no evidence of bad faith on behalf of the Kentucky State Police regarding the loss of the surveillance video from Hall's Community Market. The police obtained a copy of what they believed to be the relevant portion of the surveillance video, but due to a recording error at the store, the recording that the police received did not cover the relevant time period. Isaac does not suggest that the police failed to obtain the correct surveillance video due to a plan or intentional act. Rather, the actions of the police in failing to obtain the correct surveillance video at most constituted mere negligence. As there was no proof of bad faith on the part of the police, Isaac's due process rights were not violated by the denial of a missing evidence instruction.”

The Court upheld his convictions.

## **TRIAL PROCEDURE / EVIDENCE – THREATS**

### **Dixon v. Com., 2016 WL 672026 (Ky. 2016)**

**FACTS:** Dixon and Ballentine were a couple for five years. On the night of their breakup, in Fayette County, Dixon assaulted Ballentine. Martin, a friend of the pair, claimed that Dixon “threatened killing Ballentine at least three times in the following weeks.” Two months later, he shot her multiple times, resulting in life-threatening injuries and paralysis.

Dixon was convicted of Assault 1<sup>st</sup> and Wanton Endangerment 1<sup>st</sup>. He appealed.

**ISSUE:** Are threats made against a victim admissible?

**HOLDING:** Yes

**DISCUSSION:** During the trial, Ballantine testified as to what occurred at the time of the breakup, and Martin testified as to the verbal threats. Dixon argued that the testimony was improperly admitted under KRE 404(b). The Court noted that “threats against the victim of a crime are probative of the defendant's motive and intent to commit the crime.”<sup>86</sup> The Court noted that since his defense was not that he did not shoot her, that, he admitted, but that he acted under Extreme Emotional Disturbance, evidence of his prior threats was highly probative.

Dixon's conviction was affirmed.

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<sup>85</sup> 409 U.S. 188, 93 S. Ct. 375 (1972); Thompson v. Com., 2004 WL 2624165 (Ky. 2004).

<sup>86</sup> Sherroan v. Com., 142 S.W.3d 7 (Ky. 2004)

**Patel v. Com., 2016 WL 837269 (Ky. App. 2016)**

**FACTS:** Patel owned a number of businesses, in particular, a “Comfort Inn in Richmond, Kentucky, and a Marathon gas station in Mt. Horab, Ohio.” Stuard is an electrician who had worked for Patel in the past. In mid-2012, they ran into each other, and Patel asked for Stuard to do a small repair job for him. When they met for the job, “Stuard alleges that Patel asked him if he would be willing to burn down the Comfort Inn. Stuard did not acquiesce.” A few days later, they met at the hotel and Patel “took Stuard to the utility room and showed him the fire panel and where he could turn off the sprinklers.” Further conversation ensued, with Patel offering to pay Stuard to burn it down.

At this point, Stuard realized that Patel was serious about burning the hotel down. He also knew that there was a surveillance camera at the hotel, which recorded him while he walked around the hotel. Stuard became concerned that if the hotel burned down, he would be a prime suspect. After he left the hotel, he contacted his attorney. Eventually, Stuard was put in contact with the Kentucky State Police.

KSP worked with Stuard to document the situation. The two men talked and set up a meeting, during which Stuard wore a wire. Stuard temporarily disabled the gas station sign, at Patel’s request, as well. A few weeks later, they met again and discussed details related to the proposed arson. When KSP realized Patel was planning to leave the country, they arrested him for Solicitation to Commit Arson 1<sup>st</sup>.

At trial, Patel objected to the introduction of the conversations he’d had with Stuard about sabotaging the “Marathon gas station sign in order to collect the insurance money (the Marathon incident)” under KRE 404(b). “The Commonwealth countered that the evidence was not only inextricably intertwined but also admissible to prove motive and plan or preparation. The trial court agreed that the evidence was within the purview of KRE 404(b) but found that it was within the rule’s exceptions.”

Patel was convicted and appealed.

**ISSUE:** When prior bad acts are interconnected with the case being tried, may someone testify about them?

**HOLDING:** Yes (but see discussion)

**DISCUSSION:** The court noted that there is an exception to the usual rule “if the evidence is “so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.” KRE 404(b)(2).” The Court agreed that in this case, the “evidence was offered to establish proof of motive and plan or preparation” and was properly admitted. The connection between the Marathon situation and the hotel was that “both acts shared a motive – accessing insurance money.” The evidence suggested the two situations were connected and that “the Marathon sign was part and parcel of a larger plan as well as preparation for Stuard to set fire to the Comfort Inn.”

When several bad acts are connected together as part of one common scheme and have a common end, they may be given in evidence.<sup>87</sup> The common scheme or plan exception refers to the concept that the charged offense was but one of more related criminal acts.<sup>88</sup> Further, the prior bad act of the common scheme or plan must be connected in the sequence of events making up the crime.

Further, the Marathon situation was “evidence was intimately connected with and explanatory of the crime charged against Patel and so much a part of the circumstances of the case that its proof is appropriate to set out the complete events of the crime. The negotiations between Patel and Stuard about the Marathon incident and the planned arson of the Comfort Inn were so closely related that both were necessary to understand Patel’s crime.

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<sup>87</sup> Raymond v. Com., 96 S.W. 515 (1906).

<sup>88</sup> Com. v. English, 993 S.W.2d 941 (Ky. 1999).

The Court upheld his conviction.

## TRIAL PROCEDURE / EVIDENCE – ADOPTIVE ADMISSIONS

### **Moss v. Com., 2016 WL 837365 (Ky. App. 2016)**

**FACTS:** On January 23, 2013, Sanders and Layle returned to Layle's Bowling Green home, which she shared with Moss. Sanders later testified that while the three were drinking, Layle and Moss argued constantly. Sanders fell asleep on the couch. Sometime during the night, Layle woke up Sanders and told her that Thompson was coming over, and he arrived in due course. Sanders and Thompson were "sitting in the living room when Sanders saw Moss with his hands around Layle's neck." Sanders tried to intervene but was pushed away. She saw Moss and Thompson "locked up" and fighting with each other. "Thompson told Sanders to get her shoes on to leave, and after that Moss began to scream for everyone to leave." As Sanders was getting her shoes on, she heard a gunshot and found that Thompson had been shot – he died soon after. As Sanders was sitting next to him, "Moss placed a samurai sword in Thompson's hand." She knocked it out of his hand. Moss later claimed he'd shot Thompson in self-defense because he came at him with the sword.

When the police arrived, they found the body of Thompson on the front steps of the residence with a bullet wound in his back. A shell casing was located inside the house. The officers brought Moss, Layle and Sanders inside the residence, where Sanders stated with a raised voice that Moss had "shot [Thompson] in the back for no reason."

At the time of his death, Thompson had methamphetamine, alcohol and several medications in his body. Moss also had a blood and urine screen, and his BA was .01762. Moss was convicted of Manslaughter and Tampering with Physical Evidence, and he appealed.

**ISSUE:** Are adoptive admissions admissible?

**HOLDING:** Yes

**DISCUSSION:** Moss argued on several points. First, he argued that Sanders' statement that he'd shot Thompson for no reason, could not be admitted as an "adoptive admission" under KRE 801A(b)(2). An adoptive admission is "[w]hen incriminating statements are made in the presence of an accused under circumstances that would normally call for his denial of the statements, and it is clear that the accused understood the statements, yet did not contradict them, the statements are admissible as tacit, or adoptive admissions."<sup>89</sup>

The rule reads:

(b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:

...

(2) A statement of which the party has manifested an adoption or belief in its truth[.]

Further, in Trigg v. Com., "the Kentucky Supreme Court concluded that the adoptive admission should have been excluded on the basis that no accusatory statement was made to the defendant, noting that "[w]ithout the accusatory or incriminating statements, there is nothing that one's silence may be said to have impliedly ratified and adopted as his own."<sup>90</sup> In Terry v. Com., it had "held that an adoptive admission should not have been admitted when "[the witness] was not present in the room with [the defendant] when [the declarant] made the statement and did not discover that [the defendant] was still in the residence until after the statement was made." Therefore, "[the witness] could not and did not testify

<sup>89</sup> Marshall v. Com., 60 S.W.3d 513 (Ky. 2001).

<sup>90</sup> 460 S.W.3d 322 (Ky. 2015)

that [the defendant] agreed or disagreed with the statement, or that he heard it and did not deny it.”<sup>91</sup> Finally, in Blair v. Com., the Court had noted that “[the witness] could neither see nor hear [the defendant] when these statements were made[]” in order to determine whether the defendant heard and understood the statements. In Dant v. Com., the court held that a nonresponsive answer to an accusatory statement can constitute an adoptive admission, as even a nonresponsive answer would demonstrate an understanding on the part of the defendant.<sup>92</sup>

In this case, “an accusatory statement was actually made in Moss’s presence. Even though Moss never affirmatively testified that he “heard and understood” the statement, there was extensive testimony elicited from witnesses establishing that the statement was made loudly within the defendant’s close proximity.” However, in Cessna v. Com., a statement should have been excluded because the incriminating statements were made by his wife, while the defendant was under arrest and having had been given Miranda warnings, effectively silencing him.<sup>93</sup> In contrast, however, the Kentucky Supreme Court had “held that no Fifth Amendment violation occurred when the trial court permitted the introduction of an adoptive admission by a defendant made to a private citizen, Waldrop, even though the defendant was in custody at the time.”<sup>94</sup> Similar to Buford, “there was simply no indication that Sanders was acting on behalf of the government when she made the accusatory statement.” The Court agreed it was validly admitted as an adoptive admission.

The Court also looked to whether his “pre-arrest silence” was properly used against him in Court. The Court noted there was no binding state authority in Kentucky that would indicate “whether a defendant’s pre-arrest silence may be used against him or her as substantive evidence of guilt, we are without binding state authority.” Moss argued that he was in custody when he spoke to the detective, but the court found nothing in the record that indicated that he was. Factors to look at include “the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police.”<sup>95</sup> He went unhandcuffed with police, riding in the front seat of a deputy’s car, and they “made small talk throughout the ride.” Although five officers were present, “the record contains no indication that Moss was handcuffed at that point, that the officers used threatening language or that there was otherwise an inherently coercive atmosphere.”<sup>96</sup> Furthermore, Moss spoke voluntarily to officers and never affirmatively invoked his right to remain silent.”<sup>97</sup> The Court looked to Seymour v. Walker, in which, similar to Moss, the defendant testified in their own defense and argued for self-defense.<sup>98</sup> As such, it was proper to allow the prosecution the chance to rebut that defense. Finally, the Court looked to Parrish v. Com., and agreed that “his pre-arrest silence may be used as substantive evidence.”<sup>99</sup>

The Court also looked at whether it was error to exclude the drugs found in Thompson’s urine, with Moss arguing that the “long-term effects of substance abuse (and particularly methamphetamine) were relevant to Thompson’s behavior that night.” The Court looked to Burton v. Com., a DUI fatality case, and noted that “the tests could not determine the concentration of these substances in Burton’s system or when he had ingested the substances.”<sup>100</sup> The Court agreed that the only value in admitting the urine results is that it would brand the individual as a “user of drugs” – but with a urine test, the value of such evidence was only speculative and prejudicial. In Burton, as in this case, the “poor reliability of urinalysis testing, as substances are found in the urine for a much longer period of time than they are active in the blood.”

The Court upheld Moss’s convictions.

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<sup>91</sup> 153 S.W.3d 794 (Ky. 2005)

<sup>92</sup> 258 S.W.3d 12 (Ky. 2008).

<sup>93</sup> 465 S.W.2d 283 (Ky. 1971).

<sup>94</sup> Com. v. Buford, 197 S.W.2d 66 (Ky. 2006).

<sup>95</sup> Com. v. Lucas, 195 S.W.3d 403, 405 (Ky. 2006)

<sup>96</sup> Smith v. Com., 312 S.W.3d 353, 359 (Ky. 2010) (discussing the requirements for a finding that a defendant is in custody).

<sup>97</sup> See also Salinas v. Texas, 133 S. Ct. 2174 (2013)

<sup>98</sup> 224 F.3d 542 (6<sup>th</sup> Cir. 2000).

<sup>99</sup> 581 S.W.2d 560 (Ky. 1979),

<sup>100</sup> 300 S.W.3d 126 (Ky. 2009); See also Moorman v. Com., 325 S.W.3d 325 (Ky. 2010):

## TRIAL PROCEDURE / EVIDENCE – TESTIMONIAL HEARSAY

### Thomas v. Com., 2016 WL 354318 (Ky. App. 2016)

**FACTS:** On March 2, 2010, Thomas was a front desk clerk at a Lexington motel. The female victim and a man were guests. At some point, a disturbance erupted between the couple and the man was removed by police. Thomas asked the victim to come to the desk to sign paperwork, but instead, met her at the door to the laundry room. Thomas told her he could have her removed, and subsequently, they had sex there. Following that, the victim went to her room, cleaned herself up and called her daughter and son-in-law, reporting she'd been raped. The washcloth she used was preserved and ultimately, Thomas's DNA (taken from a buccal swab) was found on the cloth.

Lexington police were summoned and arrived in minutes. The victim was taken to the hospital but refused to be examined there. An exam was eventually done at another hospital. At the time of the second exam, her blood alcohol was .124, and other intoxicants were detected in her blood.

By the time DNA was returned, in November, Thomas was out of state. He was located and arrested in 2013. During that time, the victim had died. The primary evidence was the conversation the victim had with her daughter, along with medical evidence. The trial court admitted the conversation as under the "excited utterance hearsay exception."

Thomas took a conditional guilty plea to sexual misconduct and appealed.

**ISSUE:** Are excited utterances admissible, even if hearsay?

**HOLDING:** Yes

**DISCUSSION:** First, the Court addressed the issue of the admissibility of the victim's statements, via her daughter. Thomas relied on "Crawford v. Washington"<sup>101</sup> and "Parson v. Com."<sup>102</sup> which state that hearsay statements which are "testimonial" in nature are inadmissible under the Confrontation Clause, regardless of whether they fit into any exceptions to the hearsay evidence rule." The critical question was the victim's "constitutional unavailability and the lack of opportunity to cross-examine." The Court agreed that if the statements were considered testimonial, they should have been excluded. The Court looked to the "early identical factual situation in Hartsfield v. Com."<sup>103</sup> and was asked to determine whether a declarant's statements to her daughter concerning her rape were testimonial or non-testimonial. The victim in Hartsfield made two separate statements: a cry out for help to passersby immediately following her attack, and another statement to her daughter a few minutes later." In that case, the Court reached to Davis v. Washington"<sup>104</sup> and agreed that the statements were not testimonial. "The statements were "spontaneous and unprompted by questioning... not formal, not delivered to law enforcement or its equivalent, and were in the nature of seeking help for an emergency (even though it was not ongoing)." Even though the daughter urged her mother to preserve the evidence (the washcloth) and that several minutes had passed from the time of the rape until the victim reached her room and had a chance to recover and clean herself, that it was still within the time frame to be considered an excited utterance under Rule 803(2). The Rule defines an excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

The Court continued:

The justification for the admissibility of such evidence is that "statements made under the stress of excitement are more likely to be the product of that excitement and, thus, more trustworthy

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<sup>101</sup> 541 U.S. 36 (2004).

<sup>102</sup> 144 S.W.3d 775 (Ky. 2004).

<sup>103</sup> 277 S.W.3d 239 (Ky. 2009).

<sup>104</sup> 547 U.S. 813 (2006).

than statements made after the declarant has had an opportunity to reflect on events and to fabricate.”<sup>105</sup>

The burden of proof to have such a statement admitted falls to the party who is seeking the exception, and the guidelines are as follows:

- 1) the lapse of time between the event and the statement;
- 2) the opportunity or likelihood of fabrication;
- 3) inducement to fabricate; 4) actual excitement of the declarant;
- 5) the place of the declaration;
- 6) the presence of visible results of the act to which the declaration relates;
- 7) whether the utterance was prompted by questioning; and
- 8) whether the utterance was self-serving or against the interest of the declarant.<sup>106</sup>

The Court agreed that

Temporal proximity to the ‘startling event’ is only one factor to consider..., it must appear that the declarant’s condition at the time was such that the statement was spontaneous, excited, or impulsive rather than the product of reflection or deliberation.”<sup>107</sup>

In this case, the Court agreed, all of the factors weighed in favor of admission. Further, the washcloth refuted his initial claim, that he hadn’t touched the victim at all.

The Court also noted that although the victim was intoxicated, there was no indication that she was so impaired as to be incompetent. Evidence as to intoxication “went to the credibility of her statements rather than their admissibility” – and that was for the jury to decide. The Court upheld his plea.

#### **Prater v. Com., 2016 WL 1068360 (Ky. 2016)**

**FACTS:** Stephens and Prater worked together at a Somerset restaurant. Stephens and her husband at the time were friends with Larry and Debbie Taylor. Stephens and Larry began an affair and Stephens and her husband divorced. The Taylors remained married. Stephens asked Prater if he could arrange to have Debbie Taylor killed, and Prater agreed and set a price. Prater gave him a front payment of \$1200-1500.

During the winter of 2012/2013, Prater made a couple of trips to the Taylor home to do surveillance. A neighbor spotted Prater’s car and made note of it, and at one point, Prater told the neighbor he was with the FBI, even giving the neighbor a ride one day. (During that ride, the neighbor, Aul, saw mail in the car with Prater’s name.)

On the evening of February 6, 2013, Prater asked Denning and Turner (brothers) if they would go with him to the Taylor residence to be lookouts the next day. That next day, “one or all three of them knocked her to the ground, handcuffed her, and shocked her several times with a stun gun.” They told her they were the FBI and asked her about drugs and the alarm code. Aul saw Prater’s car and heard the Taylor’s dog yelp. He spoke to Wilson, another neighbor, and said he might want to check on Debbie. Wilson went to get Lay, yet another neighbor, and they went to the house. They found Prater, Denning and Turner, dressed in tactical gear and wearing a ski mask, who said that the Taylors were involved with a Mexican drug cartel. When Prater could produce no ID, they were skeptical, and eventually, they took the handcuffs off Debbie and left. KSP was contacted. Det. Correll interviewed Prater, who denied any knowledge and claimed that a cousin, Blair, an “investigator” might have been using it. Det. Correll got a search warrant and found tactical clothing and other gear, along with a stun gun with Debbie’s DNA on it, at Prater’s home. At a second interview, Prater admitted that he’d been paid to kill Debbie, but insisted

<sup>105</sup> Jackson v. Com., 343 S.W.3d 647 (Ky. App. 2011) (quoting Jarvis v. Com., 960 S.W.2d 466 (Ky. 1998)).

<sup>106</sup> Id.

<sup>107</sup> Thomas v. Com., 170 S.W.3d 343 (Ky. 2005).

he'd gone there to "scare her or warn her that Stephens was trying to have her killed." All three men were arrested.

All were charged with Unlawful Imprisonment, Conspiracy to Commit Murder, and Facilitation to first-degree Robbery and Prater was also charged with Impersonating a Peace Officer." Denning and Turner agreed to a deal to testify against Prater. Prater admitted guilt on the unlawful imprisonment and impersonating. He was convicted on the other two. During the trial, Larry testified that he'd been engaged in an affair with Stephens but that he didn't love her and that he'd told her they would never be "together." He stated that the morning after the attack, Stephens had told him she'd paid Prater to kill Debbie. Stephens had committed suicide sometime after that phone call, prior to the trial, and was thus unavailable to testify. The Court admitted it as an excited utterance or dying declaration. Prater played part of the recorded statement in which she told Larry that she wanted it to look like a heart attack so that Larry could get insurance money, but that he told her there wasn't much insurance and he was going to have to call the police. Stephens subsequently committed suicide.

Prater was convicted and appealed.

**ISSUE:** May otherwise inadmissible testimony still be considered harmless?

**HOLDING:** Yes

**DISCUSSION:** Prater argued that Larry's testimony did not fall within either of the claimed exceptions. The Commonwealth argued that even so, it was harmless, since it was "merely cumulative of Prater's own admission."

Prater's convictions were affirmed.

## **TRIAL PROCEDURE / EVIDENCE – TESTIMONY**

### **Tevis v. Com., 2016 WL 1273040 (Ky. App. 2016)**

**FACTS:** On September 22, 2013, at about 2:30 a.m., Tevis was leaving a Lexington club and walking to his car. Crocker and others were trying to separate two women fighting near the car. He took exception to Crocker when he stepped on the rear bumper of his car, and they "exchanged words." Crocker pushed Tevis against the wall and Tevis pulled a gun and shot Crocker in the chest. Crocker collapsed almost immediately, Tevis left on foot. Crocker was DOA. Ultimately, they determined that Tevis was the shooter, and Tevis turned himself in.

Tevis was indicted for Murder, having a handgun (he was a felon) and PFO. At trial, he pled self-defense. During the prosecutor's closing argument, he made references to Tevis's choice not to testify in his own defense. He was convicted of Reckless Homicide and appealed.

**ISSUE:** May a prosecutor comment on the fact that no one refuted an assertion by a defendant, when they did not testify?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to what the prosecutor said, which was that no witness testified as to Tevis's state of mind at the time of the shooting. (Logically, only Tevis could testify as to his own state of mind, and as such, this was an indirect reference to his choice to remain silent.) The jury was admonished at the time. The Court agreed that the testimony was, in fact, proper and that the prosecutor was simply commenting on the evidence.

Tevis also argued that it was improper to allow the jury to view the entire recording of the incident. Only 12 minutes of the 60 minute recording was shown in trial, but the entire recording was provided for viewing in the jury room. The Court, however, admonished the jury to watch only the 12 minutes and in

fact, there was evidence that they requested the time stamps to start and stop. As such, the Court agreed, there was no reason to believe that the jury disregarded the admonition.

The Court upheld the conviction.

## **TRIAL PROCEDURE / EVIDENCE – SPOUSAL PRIVILEGE**

### **Thomas v. Com., 2016 WL 749675 (Ky. App. 2016)**

**FACTS:** On November 28, 2012, Officer Zerhusen (Covington PD) and others were watching for individuals reported to be looking into cars. He spotted Thomas's vehicle pass and "as a matter of routine, ran its license tag through the National Crime Information Center's database." He learned the owner (Thomas) had active warrants and Officer Gilliland made a stop. Thomas was driving, with his wife, Brenda, in the passenger seat, along with Ellis in the backseat. Brenda also had an active warrant. As he had Thomas get out, the officer smelled marijuana. Thomas and Brenda were arrested, and Ellis detained. The vehicle was searched and a quantity of drug related items were found, along with a white powdery substance, methamphetamine and marijuana. Both Thomas and Brenda were charged with Possession of a Controlled Substance. The Commonwealth dismissed the charge against Brenda in exchange for her testimony against her husband. Thomas was convicted and appealed.

**ISSUE:** May a suspect invoke the marital privilege when the other party is a co-conspirator?

**HOLDING:** No

**DISCUSSION:** Thomas argued that he should have been allowed to "invoke the spousal privilege and bar Brenda from testifying against him about events that occurred during his marriage." The Court looked to KRE 504, which reads:

- (a) Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.
- (b) Marital Communications. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holders' guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.
- (c) Exceptions. There is no privilege under this rule:
  - (1) In any criminal proceeding in which the court determines that the spouses conspired or acted jointly in the commission of the crime charged;
  - (2) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:
    - (A) The other;
    - (B) A minor child of either;
    - (C) An individual residing in the household of either; or
    - (D) A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals previously name in this sentence; or
  - (3) In any proceeding in which the spouses are adverse parties.
  - (d) Minor child. The court may refuse to allow the privilege in any proceeding if the interests of a minor child of either spouse may be adversely affected.

Thomas argued that Brenda was a witness and that her proximity did not make her a co-conspirator. Brenda stated "that she was participating by going along with Thomas while he acquired the methamphetamine and had access to it during the time they were in the car." The Court looked to Pate v. Com., in which it had been held that "a wife acted jointly with her husband when she accompanied him to buy anhydrous ammonia." The Court agreed it was proper to allow Brenda to testify. The court

disagreed, to some extent, that it was proper to allow prior convictions for methamphetamine manufacture to be introduced, along with the reason being the warrant used to initiate the stop, which was also for methamphetamine trafficking, under KRE 404(b), but did not feel it was enough to overturn the conviction.

The Court upheld Thomas's conviction.

## TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

### **Fox v. Com., 2016 WL 837291 (Ky. App. 2016)**

**FACTS:** In May, 2012, Fox's stepdaughter, then age 12, told a friend of sexual abuse committed by Fox some months previously. He was indicted for Sexual Abuse 1<sup>st</sup>. Prior to trial, the Commonwealth filed notice it intended to introduce evidence of similar behavior that had occurred with two other girls, who were approximately the same age at the time the abuse occurred. At a hearing, both girls, now adult women, testified as to the abuse. The trial court concluded that given the similarities, Fox's relation or near-relation to all three victims; the victims' ages and that all three had recently developed breasts; that the victims were in a residence and in a room alone; and the time of night when all three victims were dressed for bed," it was appropriate to introduce it.

Fox was convicted and appealed.

**ISSUE:** May evidence of similar acts be admitted despite the "prior bad acts" prohibition?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that, under KRE 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Exceptions to the general rule provide that "such evidence may be admissible if offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Further, "Among the recognized but "non-enumerated" exceptions to KRE 404(b)'s exclusionary rule is evidence of a common modus operandi."<sup>108</sup>

To demonstrate such a commonality, "the facts surrounding the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same mens rea." If the prior acts do not demonstrate such a probability "then the evidence of prior misconduct proves only a criminal disposition and is inadmissible."<sup>109</sup>

In Dickerson v. Com., the Court added the following:

[A]s a prerequisite to admissibility of prior bad acts evidence, we now require the proponent of the evidence to 'demonstrate that there is factual commonality between the prior bad act and the charged conduct that is **simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual.**'<sup>110</sup>

Further, "although it is not required that the facts be identical in all respects, evidence of other facts of sexual deviance ... must be so similar to the crime on trial as to constitute a so-called signature crime." In other words, the "mere fact that there was sexual contact" was insufficient, "There must be other facts which are both similar and so peculiar or distinctive as to implicate Fox or to demonstrate a common *mens rea*." The court agreed that because "the three victims were so similarly aged, physically developed, and, for lack of a better term, "convenient" to Fox is ultimately persuasive to this Court. These

<sup>108</sup> Clark v. Com., 223 S.W.3d 90 (Ky. 2007).

<sup>109</sup> Com. v. English, 993 S.W.2d 941 (Ky. 1999).

<sup>110</sup> Dickerson v. Com., 174 S.W.3d 451 (Ky. 2005). quoting Com. v. Buford, 197 S.W.3d 66 (Ky. 2006).

are characteristics which go beyond mere coincidence or happenstance even given the elements of the crime in question. Vitally, they demonstrate not only a similarity or commonality of fact, but a distinct pattern among victims sufficient to raise the reasonable probability that the same person, Fox, perpetrated all three assaults.

The Court upheld Fox's conviction.

## **TRIAL PROCEDURE / EVIDENCE – TESTIMONY**

### **Gay v. Com., 2016 WL 197085 (Ky. App. 2016)**

**FACTS:** On November 19, 2012, Officer Stafford (Lexington PD) made a traffic stop. The officer believed that the owner/driver (Wethington) had a suspended OL. Gay was the front passenger, with Davis in the back seat. Officer Stafford had the occupants get out and Wethington gave consent for a search. Officer Middleton arrived, and asked the three men if there was anything they should know prior to the search. Gay told him there was a gun in a bag under the seat he had occupied and Middleton located it. Gay, a felon, was arrested. At trial, however, it was discovered that Middleton did not record the statement in any way. No fingerprints were found on the weapon and the gun was traced to Young. In evidence, the weapon and the loaded magazine were secured separately. Gay argued that the gun belonged to Davis and that he'd heard David "remove the clip from the gun while they were driving." (This contradicted the fact that the magazine was in the weapon when found.) Gay claimed since he knew the gun was there, he didn't want Wethington (his girlfriend) to get into trouble over it, and that he also had a warrant.

At trial, Gay was asked if Middleton was a liar in his recitation of the facts. He was ultimately convicted for possession of the firearm and appealed.

**ISSUE:** Is it proper to characterize another witness as lying?

**HOLDING:** No

**DISCUSSION:** The Court agreed that under Moss v. Com., it was improper to ask one witness to characterize another witness as lying.<sup>111</sup> However, in such instances, it is required that the defendant actually object, and Gay did not. As such, the Court upheld his conviction.

### **Chesher v. Com., 2016 WL 834306 (Ky. App. 2015)**

**FACTS:** On June 4, 2013, Chester went to the Hiser home in Edmonton (Metcalf County). Karen Hiser and Chesher had been involved in an affair, following a lengthy communication via Facebook, text messages and phone calls. Karen had told Chesher she was not happy with her husband, Ronnie, and planned to leave him. During the prior years, local police had responded to domestic disputes between the couple, but Karen had expressed no fear of Ronnie. Chester, however, believed Ronnie "had been abusing and intended to kill Karen," and he went to the home to "get Karen." "Instead, Chesher shot Ronnie between the eyes through the storm door" and Ronnie Hiser died the next day. KSP responded to the shooting and Karen identified Chesher as the assailant. Chesher left the scene and tossed the gun in a pond. He was questioned and admitted the shooting and where he'd disposed of the gun. He was charged ultimately with Murder and Tampering with Physical Evidence.

During the trial, Chester presented his defenses of self-protection and defense of another. He was convicted of Manslaughter 1<sup>st</sup> and Tampering. He then appealed.

**ISSUE:** Is it proper for a witness to vouch for the truthfulness of another witness?

**HOLDING:** No

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<sup>111</sup> 949 S.W.2d 579 (Ky. 1997).

**DISCUSSION:** Chesher argued that the Commonwealth elicited improper testimony from Trooper Maxwell, when he was encouraged to vouch for and bolster Karen's testimony. Trooper Maxwell had testified as to a prior interaction with the Hisers in which he'd talked to Karen alone about allegations of abuse. He agreed, when asked, that even under such circumstances, a party might not give truthful information, but he testified that given his long experience, he had a "pretty good feel" in such situations. He testified he did not believe Karen was "holding anything back." The Court agreed that, as a rule, "a witness may not vouch for the truthfulness of another witness."<sup>112</sup> The Court agreed that even if the question was improper, that the defense had already asked a question that opened the door to the question.<sup>113</sup>

Chesher also argued that the trooper should not have even been allowed to testify, because he had not been identified as a potential witness to the jury during voir dire. However, the Court noted, it was not a requirement in Kentucky trial procedure that the jury be so advised of potential witness, and that allowing such witnesses to testify was certainly legal under RCr 9.38.

**Cole v. Com., 2016 WL 837196 (Ky. App. 2016)**

**FACTS:** Cole worked for the Todd County Board of Education in various capacities, including serving as a chaperone for the school band. He was asked to drive students to an event in Lexington, including C.W. Eventually he was placed in a room with Cole, two other students and Wilson, the middle school principal. Wilson and the students went out to explore, while Cole stayed in the room. He was asleep when the others returned. C.W. elected to sleep on the floor between the two double beds, dressed in cargo shorts and socks, along with underwear.

At some point, C.W. awoke, and discovered that Cole was fondling him. He got up and left the room, going in search of Laughter, a teacher he trusted, in another room. Wilson, who was sleeping on the floor across the door, allowed him to leave. C.W. then reported what had happened to Laughter and Fundora. The other students were removed from the room while Cole continued to sleep – he was eventually awakened by law enforcement. "He seemed shocked" and stated he had no memory of touching C.W. and did have issues with sleep walking.

Cole was convicted of Sexual Abuse and appealed.

**ISSUE:** Does the brief passage of time prevent a statement from being an excited utterance?

**HOLDING:** No

**DISCUSSION:** First, Cole argued that it was improper to admit C.W.'s statements to Laughter and Fundora as excited utterances under KRE 803(2). Laughter testified that C.W. was "crying, shaking, very angry and was the same color red as his hair." To qualify as an excited utterance, the Court had to look at the following factors: (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving."

In this case, the trial court agreed that when C.W. pulled up his pants and went down a floor to another room did not negate that what he said was an excited utterance. Cole also argued it was improper to introduce demonstrative evidence as to whether he could have reached C.W. from the bed. Cole's attorney tried to demonstrate it could not be done, using a table in front of the courtroom,, while the Commonwealth Attorney herself then used the same table to show how it could have been done. The

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<sup>112</sup> Stringer v. Com., 956 S.W.2d 883 (Ky. 1997); Hall v. Com., 862 S.W.2d 321 (Ky. 1993); Hellstrom v. Com., 825 S.W.2d 612 (Ky. 1992).

<sup>113</sup> Metcalf v. Com., 158 S.W.3d 740 (Ky. 2005).

Court noted that Cole initiated the demonstration and as such, he could not object to the prosecution taking advantage of the situation.

Finally, Cole argued that there was no proof that the allegedly sexual touching was done for sexual gratification of either party, but the Court agreed that “evidence of sexual gratification could be inferred from C.W.’s testimony regarding the parts of his body that Cole touched.”

The Court affirmed his conviction.

## **TRIAL PROCEDURE / EVIDENCE – BRADY**

### **Woods v. Com., 2016 WL 671216 (Ky. 2016)**

**FACTS:** On January 4, 1993, Woods entered Patricia’s Jefferson County home and raped her. Within minutes after he left, she called her husband who called the police. She gave a general description and evidence was collected. In August, 2011, Louisville Metro PD received a notice of a DNA match from KSP and Woods was charged with burglary, rape and sodomy. During the investigation, a fresh DNA sample was taken and a forensic analyst testified that it was a match to the evidence collected at the scene.

Woods was convicted and appealed.

**ISSUE:** Does the failure to mention something in a report, when it is mentioned in notes provided to the defense, violate Brady?

**HOLDING:** No

**DISCUSSION:** First, Woods argued that he was entitled to a new trial as a result of Brady violations. Specifically, the forensic analyst had noted one Negroid hair (Woods was African-American, the victim and presumably her husband were Caucasian) but did not note the presence of Caucasian hairs also found, although they were mentioned in testimony and in her work notes (which were provided to the defense). She stated she did not test those hairs since the victim testified her attacker was African American. However, the information was in the information shared with the defense prior to trial, and as such, the Court agreed, Brady v. Maryland did not apply.

The court also noted that even if the analyst’s reference to the source of the match, the Combined DNA Index System (CODIS) was improper, as it suggested Woods was a convicted felon, in the face of the overwhelming evidence of his guilt, it was harmless.

## **TRIAL PROCEDURE / EVIDENCE - EVIDENCE**

### **Smith v. Com., 2016 WL 749415 (Ky. App. 2016)**

**FACTS:** Officer Berry (Jackson County PD, assigned to U.S. Forest Service Two Rivers Drug Task Force) and Chief Goforth were investigating a theft of property, and illegal drug activity, at an address occupied by Peters and Smith (his girlfriend). Officer Berry also had information that Peters cooked methamphetamine. They obtained a search warrant, and upon arrival, found only Smith. She had methamphetamine in her pocket and three one-steps in a cooler outside, along with assorted other incriminating evidence. Officer Berry later testified that he did not smell anything suggesting manufacturing. Inside the house, they found a quantity of additional evidence.

Both Peters and Smith were charged with manufacturing methamphetamine and related charges. Peters took a plea, but Smith went to trial and was convicted. She then appealed.

**ISSUE:** Does the presence at a location indicate they may be involved in a crime?

**HOLDING:** Yes

**DISCUSSION:** Smith argued that there was no evidence that she, herself, was involved in manufacturing methamphetamine, as the evidence only indicated that “someone” was doing so, outside her boyfriend’s residence. The Court, however, noted that it was clear that Smith did stay in the home (clothing and cosmetics were found) and that she had methamphetamine on her person. As such, it was proper for the jury to infer that she was involved. The Court did agree, however, that it was improper to charge her with both possession and manufacturing of methamphetamine, as it was not clear in the jury instructions whether the jury properly differentiated between what was found on her person and what was created. As such, the Court vacated the possession charge.

**Davidson v. Com., 2016 WL 197118 (Ky. App. 2016)**

**FACTS:** Davidson was in a relationship with Collier, a personal care attendant for a quadriplegic man, James. On May 14, 2013, Collier ran several errands for him, leaving about 10:45 a.m. She texted Davidson and said she’d pick him up at her residence in Daviess County. She continued on the errands, cashing a check for James and with Davidson, headed to the grocery store. Davidson’s brother and his girlfriend met the pair at the grocery. They hatched a plan to “steal” the money in a fake robbery to be staged outside the bank.<sup>114</sup> They completed the false robbery and Collier was interviewed by Det. Payne. During his testimony, Det. Payne noted several inconsistencies which raised his suspicions.

Eventually, charges were placed against the two brothers and Collier. The brother was charged with Theft, Collier with Falsely Reporting and Exploitation of an Adult over \$300, and Davidson with Exploitation as well. Davidson was convicted, with the help of testimony from his brother’s girlfriend. Davidson argued throughout that he knew nothing of the plan, and both of the other defendants testified on his behalf. He was, however, convicted, and appealed.

**ISSUE:** Does one’s presence when a crime is planned suggest involvement?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the “evidence presented revealed that Davidson was present when the fake robbery was allegedly planned, that he spoke to his brother Clarence in the Kroger parking lot for a significant period of time, that he walked to Drury’s car with Clarence just prior to the fake robbery, that he directed Drury on where to pick up Clarence after the fake robbery, and finally, that he willingly took Collier’s “part” of the money without question. Moreover, the evidence revealed numerous inconsistencies in Davidson’s and Collier’s stories.” As such, the Court agreed the jury’s verdict was sufficiently supported and upheld his conviction.

**Smith v. Com., 481 S.W.3d 510 (Ky. App. 2016)**

**FACTS:** In January 2012, Chief Ford (Tompkinsville PD) received an anonymous telephone tip that two males were making methamphetamine in a vehicle in front of where Curtis lived, and that Curtis was one of the two men. An address was provided. Officers found Curtis and Smith in the truck. As they approached, “Curtis exited the truck and ran into the house, dropping a bottle in the yard as he did so. Curtis ran through the house and exited the other side, essentially running into the police chief.” Smith remained in the vehicle until he was ordered out. Inside the open door, the officers could see an open duffel bag with manufacturing components inside. However, as they were not certified to handle a lab, additional officers were summoned who took care of it. It was tested and was positive for pseudoephedrine/ephedrine and methamphetamine.

Smith was charged with Manufacturing Methamphetamine and related offenses. He moved for suppression and was denied. On the day of the trial, he argued for a continuance because he learned

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<sup>114</sup> Much of this was documented by surveillance video from the grocery and the bank.

that two of the three officers who handled the lab were on deployment and unavailable. That was denied and he was convicted of manufacturing and possession. He appealed.

**ISSUE:** Is the defense entitled to a continuance when needed to ensure the presence of a critical witness?

**HOLDING:** Yes

**DISCUSSION:** First, Smith argued he was entitled to the continuance, as part of his defense was that the lab found was not “active.” He argued the bag belonged to Curtis and he did not know what was in it. The Court noted that trial courts have a great deal of discretion in deciding on a continuance. Looking at the factors considered in such cases, it was agreed the two officers would likely be available in about 8 months and there had been no prior continuances. No substantial inconvenience was demonstrated and no explanation was given for any problem with the other witnesses. Smith did not cause the delay, nor was the delay purposeful. (Curtis had testified that Smith was aware that he was “smoking off” a lab while they sat in the truck.) Other law enforcement witnesses could not testify, as they lacked knowledge, as to the stage of manufacturing that was occurring. (The expert witness, of course, could not tell, as he did not actually see the lab, but was depending upon reports.) Certainly, the two officers who were certified were the strongest witnesses. The Court agreed that Smith was entitled to a continuance and reversed his conviction.

The Court elected, however, to address other issues as well, in anticipation of another trial. Smith argued that the testimony on the anonymous tip was inadmissible and harmful. The Court noted that

“Extrajudicial statements to a police officer are inadmissible hearsay unless offered to explain the basis for the action later taken by the police officer.”<sup>115</sup> The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible only if there is an issue about the police officer’s action.”

The Court noted that the evidence that they were in the truck while the methamphetamine was being manufactured and that even allowing that the testimony was improper, it was not harmful error.

## **WORKER’S COMPENSATION**

### **City of Independence v. Dunford, 2016 WL 671826 (Ky. 2016)**

**FACTS:** Dunford, an Independence police officer, slipped and fell in the police station’s parking lot. He had a long history of lower back problems and had been treated in the past. He later testified that the fall worsened those problems and he filed for worker’s compensation. He sought treatment though his regular doctor and was referred to other treatment, including pain management. He submitted these records, which included a diagnosis of “lumbar disc degeneration with foraminal narrowing and facet arthropathy.” The doctor gave him an 8% impairment rating, but could not assess what his impairment was prior to the fall. Independence provided records from another doctor that indicated that his prior diagnosis was much the same, and that doctor indicated he was in the 5-8% rating before. As such, they argued, he was not entitled to an impairment rating due to the fall.

The ALJ sustained the 8% rating with three multipliers, under KRS 342.730(1)(c)1. Independence asked for a reconsideration and a finding as to whether Dunford could continue to work, and further argued that the ALJ did not consider a particular doctor’s assessment. That was denied and Independence appealed to the Worker’s Compensation board. The Board vacated and remanded, requiring “further findings of

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<sup>115</sup> Kerr v. Com., 400 S.W.3d 250 (Ky. 2013).

fact on whether Dunford had a prior active impairment.” That order was not appeared. The ALJ issued a new order but did not satisfy the Board’s directive. Again, the city appealed and again, the Board found the ALJ’s ruling insufficient. Due to contradictory orders from the various decisionmakers, Independence took the case to court. The court of appeals affirmed that the decision by the Board “was not making a merit based factual finding or legal holding concerning the preexisting condition in its opinions, but was only highlighting the evidence the ALJ could consider on remand.” Independence appealed.

**ISSUE:** Is a pre-existing impairment an issue in worker’s compensation claims?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the Board “pointed out certain evidence that the ALJ needed to review and analyze in his new opinion, but did not mandate the ALJ reach a certain result.” The Court agreed that “on remand, the ALJ is free to find that Dunford did or did not have an active pre-existing impairment. The key will be for the ALJ to provide a detailed analysis of the evidence in the record and an explanation for his decision.” It agreed that even if he had a pre-existing condition, he would still be entitled to “some future medical benefits,” as he did suffer a compensable work-related injury. The Court affirmed the decision of the Board.

## **OPEN RECORDS**

### **Cabinet for Health and Family Services v. The Todd County Standard, 2015 WL 8488911 (Ky. 2015)**

**FACTS:** On February 15, 2011, the Todd County Standard requested records from the CHFS concerning a specific child that had died from abuse or neglect, under KRS 620.050(12)(a). The Cabinet did not respond and the Standard appealed. On March 3, the Cabinet did respond, stating it possessed no records because the death was not as a result of abuse or neglect. The Standard appealed and the Attorney General investigated further, but the Cabinet did not respond to written questions from the OAG.

The OAG ruled that the lack of response initially violated KRS 61.880(1) and that the “fact that the individual responsible for responding was out of the office, and the person asked to complete the task became ill, has no bearing on this issue.” Substantively, the OAG noted that there is a dilemma posed when an agency simply denies the existence of a record, and that removes accountability. To balance that, in *Bowling v. Lexington-Fayette Urban County Government*, the courts resolved the dilemma by determining that “before a complaining party is entitled to . . . a hearing [to disprove the agency’s denial of the existence of records,] he or she must make a prima facie showing that such records do exist.” If a document is required to exist, by law, then it can be presumed to exist, however – noting that “the existence of a statute, regulation, or case law directing the creation of the requested record creates a presumption of the record’s existence, but this presumption is rebuttable. The agency can overcome the presumption by explaining why the “hoped-for record” does not exist.”

In this case, given that the child was in state care and died under suspicious circumstances, the initial denial of the existence of the record required more of an explanation than what was given. (The child was murdered by an older sibling, and it was determined that the child’s adoptive parents knew that the older child was physically violent and did not protect the younger child.)

The Standard further filed suit, seeking enforcement of the OAG’s decision (11-ORD-074).

In its response, the “Cabinet for the first time admitted that it possessed records concerning A.D. but asserted that such records were not accessible under the ORA. The Cabinet claimed that A.D.’s death was not a result of abuse or neglect by a parent or guardian; thus, the Cabinet did not conduct ‘an investigation as a fatality.’ The Cabinet also filed a motion to submit all records pertaining to A.D. to the circuit court for an in camera review. The court granted the motion and reviewed the records.” The Standard argued that it was entitled to the records since the Cabinet never appealed the underlying OAG decision. The Circuit Court agreed, determining that “the Cabinet improperly failed to respond to the Standard’s open records request.” When it then failed to appeal the decision, the “opinion now has the

full force of law and is subject to enforcement by the court.” The circuit court directed that the records it had reviewed be made available to the public. It also awarded The Standard approximately \$10K in fees and costs, as well as over \$6K in statutory penalties. The Cabinet appealed.

**ISSUE:** May an agency subvert the ORA by denying records exist?

**HOLDING:** No

**DISCUSSION:** The Cabinet argued that the “that the Attorney General never determined that the records as to A.D. were accessible under the ORA; thus, the Cabinet asserts that it was error for the court to enforce the Attorney General’s Opinion by ordering release of the records.” The Court looked to the ORA and noted that initially, it stated it had no records at all. The OAG was “prevented by the Cabinet” from determining if the records were accessible by denying their existence at all, and refusing to answer any questions about the matter. Had they responded truthfully, the OAG would have been able to perform its statutory function.

The Court concluded:

The Cabinet cannot benefit from intentionally frustrating the Attorney General’s review of an open records request; such result would subvert the General Assembly’s intent behind providing review by the Attorney General under KRS 61.880(5). Thus, we conclude that the circuit court properly rendered summary judgment enforcing the Attorney General’s Opinion by ordering production of records concerning A.D.

The Court further upheld the fine, but did not allow post-judgment interest.

## **CIVIL LITIGATION**

### **Smith / Grayson v. McCracken, 2016 WL 749904 (Ky. App. 2016)**

**FACTS:** On April 19, 2013, a 12-year-old boy (D.P.) was injured in a fight with three other student at Grant County Middle School; his leg was broken. His parents sued Grayson (the principal) and Smith (the Vice-Principal) as well as others, arguing that the “school personnel were negligent in failing to provide a safe environment and to protect D.P. from bullying.” The school personnel moved for summary judgements, arguing that they had “had failed to identify any specific actions or inactions by school personnel that caused D.P.’s injury and further that, to the extent they were sued in their individual capacities, they were entitled to qualified governmental immunity for discretionary acts performed in good faith.” Summary judgement was granted to all but Grayson and Smith, who filed an interlocutory appeal of the denial.

**ISSUE:** Is providing an overall safe school environment a ministerial or discretionary task?

**HOLDING:** Discretionary

**DISCUSSION:** The Court agreed that the recent decision in “Marson v. Thomason is dispositive and that they are entitled to qualified immunity from suit in their individual capacities. We agree.”<sup>116</sup>

Under Kentucky law, public officers and employees sued in their individual capacities enjoy qualified official immunity when they negligently perform “(1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee’s authority.”<sup>117</sup> Therefore, “qualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the

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<sup>116</sup> 438 S.W.3d 292 (Ky. App. 2014),

<sup>117</sup> Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

law.”<sup>118</sup> Application of the defense, “rests not on the status or title of the officer or employee, but on the [act or] function performed.”<sup>119</sup> Indeed, the analysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial. “Discretionary acts are, generally speaking, ‘those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment.’”<sup>120</sup> “Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed.”<sup>121</sup> In other words, discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. In contrast, “ministerial acts or functions—for which there are no immunity—are those that require ‘only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.’”<sup>122</sup>

The Court agreed that the actions of Grayson and Smith were discretionary, rather than ministerial, and that the parents “have never identified any specific duty beyond generally providing a safe school environment that he owed to their son. As in Marson, Grayson’s duty to look out for students’ safety was a general rather than specific duty, requiring him to act in a discretionary manner by “devising school procedures, assigning specific tasks to other employees, and providing general supervision of those employees.”

Without question, Grayson’s general responsibility for student safety was discretionary rather than ministerial.” Further, there was nothing to indicate that Smith had a “ministerial duty to monitor students in the bathrooms between classes” – although he did assign teachers to hallway duties. The record did not indicate that Smith was aware of specific situations in which D.P. was a victim, although he had been involved in situations where he had “instigated physical altercations with other students.” Issues of bullying had been addressed previously as well. Further, the actions must be done in good faith, which the Court concluded, was the case as well.

The Court reversed and awarded Smith and Grayson qualified immunity and summary judgement.

### **Creech v. Shouse (Owsley County Sheriff), 2016 WL 837136 (Ky. App. 2016)**

**FACTS:** On April 5, 2011, the Owsley County SO received a call from a local gas station that a female had just passed a counterfeit \$100 bill. “The attendant was able to provide a description of the male suspect, as well as the color and license plate number of his vehicle.” Sheriff Shouse, along with Deputies Havicus and Reagan found and stopped the vehicle. Creech was driving, with her son, Goodman, in the passenger seat. In searching the vehicle, five \$100 counterfeit bills and three \$50 counterfeit bills were found in Goodman’s wallet. Both were arrested.

Creech was charged with Complicity to Criminal Possession of a Forged Instrument. However, because there was no evidence that Creech knew that the bills were counterfeit, the grand jury did not indict. However, a clerical error resulted in paperwork that indicated that she was indicted, and she was arrested pursuant to a warrant. She stayed in jail for approximately 2 months until she posted bail. It wasn’t until October that it was discovered by the Commonwealth’s Attorney’s office that she had not, in fact, been indicted and the case was promptly dismissed.

Creech filed suit against all parties. The trial court promptly dismissed most of the official capacity claims, but allowed the those parties who worked for the prosecutor’s office to continue to be sued in their individual capacities, since although they were arguing clerical error, “Creech alleged intentional misconduct, thus creating a factual dispute that required discovery.” “With respect to Shouse, Havicus,

<sup>118</sup> Rowan County v. Sloas, 201 S.W.3d 469 (Ky. 2006) (quoting Anderson v. Creighton, 483 U.S. 635 (1987).

<sup>119</sup> Yanero at 521 (citing Salver v. Patrick, 874 F.2d 374 (6<sup>th</sup> Cir.1989)).

<sup>120</sup> Haney v. Monsky, 311 S.W.3d 235 (Ky. 2010) (quoting Yanero, 65 S.W.3d at 522).

<sup>121</sup> Upchurch v. Clinton County, 330 S.W.2d 428 (Ky. 1959) (quoting 43 Am.Jur., Public Officers, § 258).

<sup>122</sup> Haney, 311 S.W.3d at 240 (quoting Yanero, 65 S.W.3d at 522).

Reagan, and Cope (“law enforcement appellees”), the trial court granted the motion to dismiss Shouse in his official capacity on absolute immunity grounds for his own intentional or unintentional acts, but ruled that the office of the Owsley County Sheriff remained liable for the acts of its deputies pursuant to the legislative waiver of immunity set forth in Kentucky Revised Statutes (KRS) 70.040. As such, the motion to dismiss the claims against Havicus and Reagan in their official capacities was denied.” (The Jailer was also sued and treated as one of the “law enforcement appellees.”) Following discovery, all of the parties were dismissed and Creech appealed.

**ISSUE:** Is the execution of a warrant ministerial or discretionary?

**HOLDING:** Ministerial (but see discussion)

**DISCUSSION:** With respect to the law enforcement appellees, and acknowledging that “qualified immunity only applies to discretionary acts,” that the “execution of an arrest warrant is a purely ministerial function and thus not within the scope of qualified immunity.” The Court looked to Yanero v. Davis, which states that “qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee’s authority.”<sup>123</sup> However, “an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, i.e., one that requires only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.”<sup>124</sup>

The Court agreed that executing a warrant is a ministerial function “for which there is no immunity for negligent performance or nonperformance.” However, it is clear that “if ministerial acts are proper, then the public officer or employee has official immunity without qualification.”<sup>125</sup> The trial court found, and the appellate court agreed, that there was “simply was no evidence of negligence or misfeasance on the part of the law enforcement appellees, and thus no acts to waive under the protection of immunity.” The Court found no obligation for the deputies and the sheriff to “go behind the face of every indictment containing the signatures of a judge, clerk, and a foreperson, in addition to their many other duties, to see if the Grand Jury really meant to have each individual indicted.” The Court agreed there was simply no negligence at all on their part.

The law enforcement appellees’ duty was to execute the arrest warrant and incarcerate Creech thereupon. They did exactly that and the record herein is devoid of any evidence that any of them acted in a negligent manner in carrying out their duties.

The Court agreed that the law enforcement appellees were properly dismissed in both their official and individual capacities.

## **EMPLOYMENT**

**Louisville Metro Police Department v. Baker / Louisville Metro Police Merit Board, 2016 WL 837366 (Ky. App. 2016).**

**FACTS:** Baker was terminated from LMPD when it was discovered that he was renting a home to his mother under Section 8, which was expressly prohibited. He had reached a diversion agreement with the U.S. Attorney when it was discovered he was doing so, which required him to admit to violating federal law. He appealed his termination to the Board, which upheld it. He then further appealed and the Circuit Court reversed his termination. The Board and the Department appealed.

**ISSUE:** Is a termination based on an admitted violation of federal law proper?

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<sup>123</sup> Yanero, supra.

<sup>124</sup> Franklin County v. Malone, 957 S.W.2d 195 (Ky. 1997)."

<sup>125</sup> Autry / Yanero, supra.

**HOLDING:** Yes

**DISCUSSION:** The Court first addressed several procedural concerns, including the initial failure to name the Board as an indispensable party, although with the Department. However, the Court ruled it was improper to reverse the termination, as the termination was based on his admission that he had violated federal law and acknowledged that in his diversion agreement.

The Court reinstated his termination.

**Hankins v. Smith and City of Flatwoods, 2016 WL 671933 (Ky. 2016)**

**FACTS:** Hankins was terminated as Chief of Police, for Flatwoods. He asserted that he was fired as retaliation for his refusal to disclose information concerning an ongoing investigation to the Mayor, with the City arguing he was terminated for insubordination, improper management and sexual harassment. Hankins filed suit and the City moved for summary judgement, arguing that he failed to exhaust his administrative remedies under KRS 15.520 and 95.450. The City subpoenaed Hankins' attorney, for documents, which Reed refused to produce, arguing privilege.

The Court denied the city's motion, allowing discovery, also ordering Reed (and Hankins) to produce certain items. Specifically, Reed argue that the "contested materials are privileged and relate to an ongoing criminal investigation of City employees that is being conducted in part by the Kentucky State Police." Various motions were entered, with the motion for relief of discovery being at immediate issue.

**ISSUE:** Are third party communications privileged?

**HOLDING:** No

**DISCUSSION:** The court agreed that Hankins and Reed had failed to prove that the requests in question were, in fact, privileged. The communications at issue were between Reed and the Commonwealth Attorney and the City Attorney and as such, are "clearly third party communications that are not protected by attorney-client privilege."<sup>126</sup>

The Court upheld the order denied Hankins and Reeds requested writs of prohibition and mandamus.

**Thompson v. City of Greensburg, 2016 WL 675824 (Ky. App. 2016)**

**FACTS:** On November 9, 2010, Thompson was suspended from his job as a police officer for Greensburg pending investigation and possible charges. On December 2, he was presented with the allegations and their factual bases, with including the posting of inflammatory, false and misleading statements on Topix, using a department computer, while on duty. Officer Moon testified at the subsequent hearing concerning a keystroke logging program that had been installed, and that he occasionally checked the log periodically for improper usage. Chief Brady testified about the postings, which involved a "local love triangle," noting concerns about risks of domestic violence in the situation. He testified that Thompson was the only officer on duty at the time, and that the evidence indicated he'd made the posting. Thompson presented evidence that members of other departments also accessed the computer and that the security camera timestamps, which showed him at the computer, were known to be wrong on occasion. He also pointed out violations of the computer policy made by others.

Mayor Cheatham, who oversaw the hearing, upheld the termination. Thompson filed suit, arguing unlawful discharge. At trial, the termination was upheld. Thompson appealed.

**ISSUE:** May the mayor conduct a due process hearing in a KRS 15.520 case?

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<sup>126</sup> Collins v. Braden, 384 S.W.3d 154 (Ky. 2012)

**HOLDING:** Yes

**DISCUSSION:** Thompson argued that the proceedings were flawed from the outset since he never received a sworn affidavit as required by KRS 15.520(1)(a)(2). He further challenged whether the mayor could lawfully preside over the hearing and whether the mayor should have had training under KRS 13B.090(1).

The Court noted that at the time, an “accusation of violation of employment policies must be signed and sworn in an affidavit.” Although he did not receive it in that form, he did receive a detailed notice of the charges and had ample opportunity to defend himself at the hearing, and as such, received due process. The Court noted that he received details on the violations and that was enough.

With respect to the mayor, the Court noted, it had already ruled that in mayor-council cities, as Greensburg is, the mayor is able to conduct due process hearings.<sup>127</sup> The Mayor noted that he was not actually involved in the investigation, although he was apprised of it, and was not prejudiced by it. Further, the Court agreed, KRS 13B did not apply to the city.

The Court upheld the termination.

## **MISCELLANEOUS – DEFAMATION**

### **Williams v. Blackwell / Daniels / McCann, 2016 WL 675415 (Ky. App. 2016)**

**FACTS:** During 2010, Williams was the sheriff of Livingston County. Blackwell and McCann were the field auditors, working for the Auditor of Public Accounts. Daniels was their supervisor, but did not review their work in this instance. The auditors were involved in an audit of the Sheriff’s Office for the year 2009.

The auditors and the sheriff engaged in a dispute about arrangements made for the sheriff to lease the fleet of vehicles to the Fiscal Court, with mileage reimbursement. At the end of the initial phase of the audit, the auditors met with the sheriff to discuss their findings. As is the norm, following the conference, they provided the Sheriff with a draft of the report and solicited his input and signature. The final report was published on February 22, 2011, and provided to the Fiscal Court and media outlets that have standing requests for such reports.

At odds in this case, is a statement that questioned the amount of the payments made pursuant to the lease and the actual costs of the fleet, and noted that the amount that the Sheriff received could be interpreted to be in excess of his statutory maximum salary limits. The auditors referred the matter for further review.

Williams filed suit for defamation against all the parties. The trial court granted summary judgement to the auditors, noting that their statements were privileged opinions and even if that was not the case, they were entitled to summary judgement under qualified official immunity. Williams appealed.

**ISSUE:** Are statements made in an audit defamatory?

**HOLDING:** No

**DISCUSSION:** Williams argued that the statement contained language that gave the appearance that the auditors were accusing him of “fraud and tax evasion,” which subjected him to “public hatred, contempt, and ridicule.” The Court looked to whether that language was defamatory, defined as “the injury to the reputation of a person in public esteem.”<sup>128</sup> To make a prima facie case of defamation

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<sup>127</sup> Howard v. City of Independence, 199 S.W.3d 741 (Ky. App. 2005).

<sup>128</sup> Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781 (Ky. 2004).

requires proof that, first, there was actual defamatory language that is about the plaintiff, which is then published and which causes injury to reputation. For a public official, such as the sheriff, it requires an additional element, that the statement “was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>129</sup>

The case of Yancey v. Hamilton is the primary case in Kentucky.<sup>130</sup> In that case, the Court noted that a “defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” As such, it differentiated between “pure opinion” – which carries an absolutely privilege – and in which all of the facts upon which the opinion is based are known or clearly stated, and “mixed expressions of opinion” – based upon facts that have not been expressed or made clear.

Opinion speech was discussed in Milkovich v. Lorain Journal Co. was decided in a way consistent with Yancey.<sup>131</sup> Using the Milkovich paradigm, “in order for an allegedly defamatory statement to be actionable, the statement must be sufficiently factual to be provable false, or the statement must imply underlying facts which can be provable as false.”

In this case, Williams argued that all the elements of defamation per se were met, and that he’d met the higher standard because they published the statement while refusing to accept and consider additional exculpatory documentation as to his expenses and reimbursement that “showed there was not ‘a material gap’ between his expenses and reimbursements.” The Court, however, noted that all of the facts underlying the auditor’s statement were properly revealed in the same document. As such, the statements were “privileged pure opinion.” Further the scope of the audit was within the scope of the auditor’s duties.

The Court agreed that the case was properly dismissed.

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<sup>129</sup> New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

<sup>130</sup> 786 S.W.2d 854 (Ky. 1989).

<sup>131</sup> 497 U.S. 1 (1990).

# SIXTH CIRCUIT

## SEARCH & SEIZURE – SEARCH WARRANT

### U.S. v. Binford, 2016 WL 1258375 (6<sup>th</sup> Cir. 2016)

**FACTS:** In fall, 2012, Det. Kinal (Oakland County, Michigan, Narcotics Enforcement Team (NET)) used a CI to make two controlled purchases of marijuana from Binford, about two weeks apart. Both were made in the parking lot of his apartment building. Officers observed both transactions. Det. Kinal then obtained a search warrant for Binford's apartment. Because of Binford's gun history, Kinal was permitted to use the Special Entry and Response Team (SERT) during the execution of the search warrant.

On October 2, Kinal, four other officers, the SERT and a K-9 team executed the warrant. The SERT team used a ram to force open the door. They found Binford, inside, naked and ordered him to the ground, where he was handcuffed. He was cooperative and compliant. They found his girlfriend and a two-year-old child and had them sit on the couch. The SERT and the K-9 cleared the apartment, and then left; Kinal and his fellow officers searched. Binford accompanied Kinal into the bathroom, draped in a sheet. Kinal later stated he did so for privacy and quiet, since Kinal intended to talk to him about becoming a CI. Once inside, Kinal removed his balaclava, which covered his face and gave Binford Miranda warnings, providing him with a typed warning/waiver form. Binford initialed where he was asked to do so and agreed to talk to Kinal. He admitted he sold marijuana and that he owned a gun, although he was a convicted felon.

Kinal later agreed that he could not recall if he ever told Binford he was under arrest or was being detained, however, he did tell Binford he was the "focus of the investigation" and that he wasn't free to leave. He did not have a specific charge at that point. Binford did not claim that he was told he was under arrest, but believed that to be the case. Kinal claimed that Binford was eager to become an informant but that he did not make him any promises. Binford agreed that Kinal never threatened him, and was calm. He did state that his girlfriend could be held responsible as well, but made no threats concerning her. He never gave a direct answer about whether he might go to jail.

When they left the bathroom, Kinal took Binford to the bedroom to get the pistol, and Binford described where it was hidden. It was retrieved. In addition, they found a quantity of marijuana, cash and packaging devices. Binford was allowed to dress, and then arrested for trafficking in marijuana.

Binford moved for suppression, argued the search warrant was invalid and that his incriminating statements should be excluded. The trial court found against him, and he was convicted at trial for both being a felon in possession and for distributing marijuana. He then appealed.

**ISSUE:** Is it proper to detain someone during the execution of a search warrant?

**HOLDING:** Yes

**DISCUSSION:** The Court first ruled that his initial detention was proper under Michigan v. Summers.<sup>132</sup> It was proper to hold Binford incident to the execution of the search warrant, and to question him while the search was ongoing, "so long as the questioning does not prolong the search."<sup>133</sup> Binford argued that questioning him, apart, in the bathroom overstepped Summers, but the Court disagreed.<sup>134</sup> The Court noted that Kinal had adequate reasonable suspicion to inquire further about Binford's involvement in trafficking. He was not removed from the apartment, but simply relocated to another room where he was questioned briefly. Questioning during a search warrant is not a separate seizure, but a part of the whole.

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<sup>132</sup> 452 U.S. 692 (1981).

<sup>133</sup> Muehler v. Mena, 544 U.S. 93 (2005).

<sup>134</sup> See also U.S. v. Fountain, 2 F.3d 656 (6<sup>th</sup> Cir. 1993).

With respect to his statements, the Court disagreed that he was coerced by implied and “illusory promises of leniency.” He had been properly given Miranda and the situation was not coercive.<sup>135</sup>

The Court continued:

In determining whether a confession is involuntary due to police coercion, this court employs a three-step analysis; ‘(i) the police activity was objectively coercive; (ii) the coercion in question was sufficient to overbear the defendant’s will; (iii) and the alleged police misconduct was the crucial motivating factor in the defendant’s decision to offer the statements.’”<sup>136</sup>

In this situation, the Court did not find the situation objectively coercive, and that “promises to recommend leniency and speculation that cooperation will have a positive effect do not make subsequent statements involuntary.”<sup>137</sup> In other words, it was only coercive if “broken or illusory.” Kinal testified that he did have the authority to make such promises as a drug task-force detective, and there was no assertion that he broke his promises.

With respect to the Miranda waiver, the Court found that his rights were “voluntarily and knowingly waived.” He understood his rights and signed the form willingly, and he had prior experience with the criminal justice system.

Binford’s convictions were affirmed.

#### **U.S. v. Bucio-Cabrales 2016 WL 1018360 (6<sup>th</sup> Cir. 2016)**

**FACTS:** In January, 2013, Bucio-Cabrales and Cortez-Torres moved into an apartment in Columbus, Ohio. There, they spend months involved in packaging and storing marijuana and cocaine at the apartment, and then delivered the drugs to six drug dealers, including Ward and Pace. Cortez-Torres and Brambila-Chavez used another address to store and package cocaine, as well. During the time in question, 100-200 pounds of marijuana was processed through the first address, as well as seven to nine kilos of cocaine.

In early 2013, DEA agents received a tip about Pace and set up a transaction with him. Pace arrived with Bucio-Cabrales, and they followed him back to that first address. They spent considerable time surveilling Bucio-Cabrales, Pace and Cortez-Torres, and believed the Bucio-Cabrales and Cortez-Torres actually lived there. They observed suspicious deliveries, “transporting unknown vehicles to the apartment before loading them and returning them to parking lots, repeatedly switching rental cars, and delivering items during short meetings at residences and shopping centers.”

As a result, and after a drug buy in May, they obtained a warrant for a specific address, believing it to be the correct address for the location. The Agent detailed her long experience in drug investigations, to wit:

*Your Affiant’s training and experience . . . form the basis of the [following] opinions and conclusions[.] . . . That it is common for drug traffickers to maintain multiple premises from which their illegal business is conducted. Drug traffickers also store narcotics, narcotics proceeds and records relating to the trafficking of narcotics at their residences . . . . That persons involved in large scale drug trafficking conceal within their residence . . . caches of drugs, large amounts of currency . . . and/or proceeds of drug sales . . . .*

She also mentioned the other address that was in use.

Further, it read:

<sup>135</sup> Moran v. Burbine, 475 U.S. 412 (1986); Haynes v. Washington, 373 U.S. 503 (1963); Colorado v. Connelly, 479 U.S. 157 (1986);

<sup>136</sup> U.S. v. Mahan, 190 F.3d 416 (6<sup>th</sup> Cir. 1999).

<sup>137</sup> U.S. v. Johnson, 351 F.3d 254 (6<sup>th</sup> Cir. 2003); U.S. v. Delaney, 443 F. App’x 122 (6<sup>th</sup> Cir. 2011).

On May 08, 2013 agents were contacted by a [confidential source ("CS")] who informed agents that he/she had received a call from a male Hispanic requesting to meet the CS at the Home Depot on Brice Rd. North of IS70. Agents monitored a call back to the male Hispanic by the CS. It was determined that this male Hispanic was a member of a [drug-trafficking organization ("DTO")] that the agents had been investigating since December 2012.

During this call the CS agreed to meet with the male Hispanic at the Home Depot lot . . . . Agents monitored the meet . . . . During this meet agents positively identified the male Hispanic as a facilitator within the DTO the agents had been investigating. The male Hispanic told the CS that [he] had ten kilograms of cocaine which needed to be sold within five days. The male Hispanic then in substance asked the CS if the CS could take some of the kilograms within the next hour.

Following this meet, surveillance followed the male Hispanic to the address of 6198 Deewood Loop West. Surveillance observed the same male Hispanic from the meet, exit the front door of 6198 Deewood Loop West. At this time the male Hispanic placed a call to the CS stating that he "had it" and that the male Hispanic did not want to return to his house with "it." The CS stated that the CS could not meet for an hour.

Surveillance units continued to observe the male Hispanic and observe him park and enter the address of 4020 Stelzer Rd. For months agents have observed male Hispanic utilize this residence and believe this to be his permanent residence.

Agents had the CS contact the male Hispanic and confirm [he] was en route to the predetermined meet location . . . . Surveillance units observed the male Hispanic leave the residence of 4020 Stelzer Rd and go directly to meet the CS. Agents observed and monitored the meet between the CS and the male Hispanic. The male Hispanic got out of his vehicle and entered the CS vehicle. The male Hispanic had a kilogram of cocaine tucked in the waistband of his pants and under his shirt. When the male Hispanic got into the CS vehicle the male Hispanic handed the kilogram of cocaine to the CS. The CS agreed to pay the male Hispanic by 7:00pm . . . and requested that [he] bring the CS two additional kilograms of cocaine at that time. The male Hispanic agreed . . . .

Surveillance units observed the male Hispanic leave the meet location and drive directly back to the address of 6198 Deewood Loop West. A short time later, surveillance units observed the male Hispanic leave the address of 6198 Deewood Loop West. The male Hispanic then returned to his address of 4020 Stelzer Rd.

Surveillance units have continued to monitor the activities of the male Hispanic and believe his pattern of activity is consistent with drug trafficking; meeting individuals in parking lots for brief periods of time, driving in a pattern with no purposeful route from one residence to another only to stay a brief time at the residence, and arriving at residences that have been determined to be involved in this investigation where surveillance observed a brief meet and exchange between the male Hispanic and other individuals yet to be identified.

Through a combination of physical surveillance and historical information derived from the GPS tracking devices and other electronic surveillance, 6198 Deewood Loop West Columbus, Ohio and 4020 Stelzer Rd. Columbus, Ohio have been identified as probable locations where agents believe there is a direct nexus to this male Hispanic and cocaine distribution.

The warrant was signed for the incorrect address.<sup>138</sup> However, it was noted, the description was detailed and accurate. During the subsequent search, a quantity of evidence was located, including evidence that indicated that both men apparently lived there.

Bucio-Cabrales was indicted for distributing. He moved for suppression on the grounds that the warrant "failed to meet the particularity requirement." He also requested a hearing under Franks v. Delaware "to

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<sup>138</sup> It was later explained that the door that led to the suspect's apartment faced out on a different road from the proper address.

determine whether Agent Durbin's warrant affidavit contained perjured statements since it attested to events allegedly observed at 4020 Stelzer Road, not 4020 Migration Lane."<sup>139</sup> That was denied and ultimately, he was convicted. He then appealed.

**ISSUE:** Does an error in a search warrant affidavit necessarily mean a false statement?

**HOLDING:** No

**DISCUSSION:** First, Bucio-Cabrales alleged that the search warrant affidavit "contained false statements." Further, he argued that it did not satisfy the particularity requirement and the affidavit "failed to establish probable cause because it did not establish a nexus between illegal drug activity" and the address.

First, for a Franks hearing, the court noted "a defendant must first satisfy two requirements: First, the defendant must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." Next, it must be shown "that the allegedly false statement is "necessary to the finding of probable cause." As such, even though the agent was mistaken, there was no indication that she had knowledge of the error, or was in "reckless disregard" of the truth. As such, it was not error to deny the hearing. The Court noted that "the confusion of his former address is obviously understandable."

With respect to the particularity argument, the Court noted the criteria is "whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched." In this case, although the physical address was incorrect, the court looked to U.S. v. Durk<sup>140</sup> in which the address was wrong but in which the description was specific and unique enough that the chance of a mistake was unlikely. In addition, the officers knew the apartment they wanted.

Bucio-Cabrales added an argument on appeal – that the warrant was defective because probable cause was not established. The Court agreed that it had "rejected the proposition that "probable cause to arrest a person for a crime . . . [may] automatically give police probable cause to search his residence or other area in which he has been observed for evidence of that crime."<sup>141</sup> As such, a warrant application "must show some "nexus between the place to be searched and the evidence sought."<sup>142</sup>

This nexus, Bucio-Cabrales argues, appears nowhere in Agent Durbin's affidavit." However, the court agreed that all that was needed was to "add to evidence that the individual is a drug trafficker "some reliable evidence" tying the residence to the individual's drug-related activity."<sup>143</sup>

He was observed going to or leaving that address while in the process of a drug transaction that was under observation.

The Court upheld his convictions.

### **U.S. v. Fuqua, 2016 WL 285052 (6<sup>th</sup> Cir. 2016)**

**FACTS:** In February, 2010, Nashville PD searched the trash behind Fuqua's house. They found trace marijuana in a number of containers, seven smoked blunts and a holster, in the same trash bag. Paperwork tied the bag to Fuqua. Det. Grindstaff obtained a search warrant with that information, along with surveillance data that tied two car to Fuqua.

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<sup>139</sup> 438 U.S. 154 (1978).

<sup>140</sup> 149 F.3d 464 (6th Cir. 1998).

<sup>141</sup> U.S. v. Savoca, 739 F.2d 220 (6th Cir. 1984).

<sup>142</sup> U.S. v. Van Shutters, 163 F.3d 331, (6th Cir. 1998) (quoting U.S. v. Alix, 86 F.3d 429(5th Cir. 1996)); accord U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004) (en banc).

<sup>143</sup> U.S. v. Gunter, 266 F. App'x 415 (6th Cir. 2008); see also McPhearson, 469 F.3d at 524–25.

At about midnight, they went to serve the warrant. They turned on emergency lights and used the PA to identify themselves, while officers were knocking. Det. Williams broke down the door and Det. Grindstaff stepped inside. They heard a gunshot and saw a person on the couch, with their hands up. Fuqua and Owens ducked behind a wall, and one of the two shot at Grindstaff. Grindstaff fired back, hitting Fuqua in the stomach. Owens was secured and Fuqua was searched, they found over \$1,600 in his pocket. Inside the home, they found marijuana and ecstasy, along with three guns. Fuqua admitted to owning the .44 found, and that he'd fired it into the ceiling, but no evidence of that was found.

Fuqua was indicted on the marijuana and the weapon, as a convicted felon. He was convicted and appealed.

**ISSUE:** Are guns and drugs “connected” for search warrant purposes?

**HOLDING:** Yes

**DISCUSSION:** Fuqua argued that the officers lacked probable cause to search the house. The Court agreed that the affidavit provided more than enough to support a search warrant. Further, the Court agreed that merging the charges was proper, as the “guns were relevant to the question whether Fuqua was distributing drugs.”

Finally, Det. Grindstaff was allowed to testify as both a fact and opinion witness. The Court agreed that the trial court properly instructed the jury as to the difference in the two types of testimony. His criticism as to Grindstaff's possible biases were fodder for cross-examination, but did not warrant exclusion. He was also qualified to testify as to the “practices of drug dealers,” and that officers were routinely permitted to do so.<sup>144</sup> (Grindstaff had been an officer for six years and worked specifically with narcotics investigations.)

Finally, the totally quantity of marijuana found (over 30 grams), along with the cash on Fuqua, was more than enough to support trafficking.

The Court upheld his convictions.

## **SEARCH & SEIZURE – CURTILAGE**

### **U.S. v. Stitt, 2016 WL 520048 (6<sup>th</sup> Cir. 2016)**

**FACTS:** In 2011, Stitt lived with his girlfriend, Hostetler, in Tennessee. “During an argument, Stitt retrieved a firearm, tried to stick it in Hostetler's mouth, and threatened to kill her. When a neighbor intervened, Hostetler left.” Responding officers went to Stitt's mother's home, where he was thought to be, and from the end of the driveway, spotted a car matching the description of the one he left in. They spotted Stitt at the back door and chased him. He surrendered, and a handgun was found within arm's reach.

Stitt, a felon, was indicted for possession of the gun. He moved for suppression, claiming that the detectives breached the trailer's constitutionally protected curtilage before spotting him at the backdoor.” The Court denied the motion and he was convicted. He then appealed.

**ISSUE:** Is a driveway generally curtilage?

**HOLDING:** No (but see discussion)

**DISCUSSION:** Stitt argued that the “end of the driveway—where the detectives stopped their car—

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<sup>144</sup> U.S. v. Swafford, 385 F.3d 1026 (6<sup>th</sup> Cir. 2004).

constituted curtilage.” The Court agreed that the “curtilage includes “the area around the home to which the activity of home life extends.”<sup>145</sup>

Four factors govern the classification of an area as curtilage:

[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing.”<sup>146</sup>

In this case, the “end of the driveway, or turnaround, stood in close proximity to the trailer, suggesting that Stitt reasonably could expect privacy there.”<sup>147</sup> However, “proximity alone does not suffice” and the other factors weigh against a finding of curtilage. The public could view and access the turnaround from the street, undermining Stitt’s expectation of privacy.<sup>148</sup>

And though the property boasted a fence, the driveway lay outside the fence, and no gate blocked the entrance. Finally, the family’s use of the turnaround reinforced its non-private nature. Testimony established that visitors parked cars in the turnaround—decidedly not an activity associated with the privacies of life.<sup>149</sup> Taken together, the factors suggest that Stitt lacked a reasonable expectation of privacy in the turnaround, and the turnaround therefore was not curtilage.

Stitt then argued that the “detectives ventured beyond the turnaround and entered constitutionally protected curtilage—the backyard—before spying Stitt at the backdoor.” The trial judge ruled that there was “no clear end to the driveway” and that the detective stated when he got out, he stepped onto the gravel of the driveway.

The Court made a final point:

Stitt emphasizes the property’s rural, low-income character, arguing that such properties lack clear divisions between curtilage and public areas. Affirming the denial of his suppression motion, he argues, would unfairly privilege wealthy homeowners who can afford fences and bushes to separate public driveways from private backyards. But a railroad tie, a large rock, or a sign would have marked the edge of the backyard and warned visitors not to proceed further. Testimony established that no such marker existed on the property.

We discern no error in the denial of Stitt’s motion to suppress.

## SEARCH & SEIZURE – PROBATION

### **U.S. v. Tessier, 814 F.3d 432 (6<sup>th</sup> Cir. 2016)**

**FACTS:** At the time of the challenged search, Tessier was on probation for 2011 conviction out of Tennessee for a sex crime involving a minor. As part of his probation, he signed the standard search condition required in Tennessee: “I agree to a search, without a warrant, of my person, vehicle, property or place of residence by any Probation /Parole officers or law enforcement officers, at any time.” He was charged in federal court with possession of child pornography found during the search. The District Court upheld the search, and the fruit of the search, and Tessier appealed.

<sup>145</sup> Daughenbaugh v. City of Tiffin, 150 F.3d 594 (6th Cir. 1998) (quoting Oliver v. U.S., 466 U.S. 170 (1984)).

<sup>146</sup> U.S. v. Dunn, 480 U.S. 294 (1987)).

<sup>147</sup> See, e.g., Widgren v. Maple Grove Twp., 429 F.3d 575, 582 (6th Cir. 2005) (finding a cleared area four to six feet away from the house

<sup>148</sup> See, e.g., U.S. v. Galaviz, 645 F.3d 347 (6th Cir. 2011) (finding no expectation of privacy when the defendant took no steps “to protect the driveway from observation by passersby”).

<sup>149</sup> Compare U.S. v. Estes, 343 F. App’x 97 (6th Cir. 2009) (finding that the use of a driveway as a “point of entry into the residence” “undercut a finding that the driveway represents curtilage”), with Pritchard v. Hamilton Twp. Bd. of Trs., 424 F. App’x 492 (6th Cir. 2011) (finding that a backyard used for swimming could reasonably be expected to be private).

**ISSUE:** Is a state policy applicable in a probation search?

**HOLDING:** Yes

**DISCUSSION:** The Court contrasted this situation with the one that occurred in U.S. v. Henry, in which it discussed a Kentucky Probation/Parole policy that did specifically require reasonable suspicion for a search.<sup>150</sup> In that case, the court agreed that the state policy required a standard not met by those who did that search. In other words, they did not meet the standard for the Kentucky policy. However, in this case, Tennessee had a different policy. In this case, the court agreed, “it cannot be argued that the suspicionless search in this case did not serve legitimate law enforcement and/or probationary purposes.” As such, the Court affirmed the plea.

## **SEARCH & SEIZURE - EXPECTATION OF PRIVACY**

### **U.S. v. Houston, 813 F.3d 282 (6<sup>th</sup> Cir. 2016)**

**FACTS:** In 2012, the Roane County (TN) SD informed that ATF that Houston, a convicted felon, was in “open possession of firearms at his residence.” Houston (and his brother, Leon) lived on a family farm consisting of three properties. “Billboards and hand-painted signs critical of government officials and depicting the dead bodies of a law enforcement officer and his civilian ride-along companion (the murders of whom Houston and his brother were tried, but ultimately acquitted) hang approximately twenty yards off the road.”<sup>151</sup> Parts of the property were blocked by hanging blue tarps and foliage. The ATF attempted surveillance, but were unable to do so as their vehicles “stuck out like a sore thumb.” They installed a surveillance camera on a public utility pole which securely broadcast signal and could be moved and zoomed in. Leon’s trailer was the focus. “At trial, an ATF agent (Special Agent Dobbs) testified that the view that the camera captured was identical to what the agents would have observed if they had driven down the public roads surrounding the farm.” The monitoring took place over ten weeks. When the case of U.S. v. Anderson-Bagshaw was rendered, in late 2012, the ATF then obtained a warrant.

In January, 2013, Houston was arrested away from the farm. Search warrants garnered 25 firearms at the farm, with 17 found in Houston’s home. He was indicted for possession. He moved for suppression of the evidence obtained from the recordings and was denied. He was convicted and appealed.

**ISSUE:** Does video surveillance from outside the curtilage violate the expectation of privacy?

**HOLDING:** No

**DISCUSSION:** The Court began, noting that:

There is no Fourth Amendment violation, because Houston had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads. The ATF agents only observed what Houston made public to any person traveling on the roads surrounding the farm. Additionally, the length of the surveillance did not render the use of the pole camera unconstitutional, because the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations. While the ATF agents could have stationed agents round-the-clock to observe Houston’s farm in person, the fact that they instead used a camera to conduct the surveillance does not make the surveillance unconstitutional.

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<sup>150</sup> 429 F.3d 603 (6<sup>th</sup> Cir. 2005).

<sup>151</sup> Deputy Bill Jones, Roane County Sheriff’s Office, and Mike Brown (former officer, civilian ridealong) were murdered in 2006 on the property.

The Court looked to California v. Ciraolo, in which the “warrantless aerial observations of curtilage” was upheld, stating that “the Fourth Amendment does not ‘preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible.’” Although in some cases he was actually in the open field, others show him “standing near the trailer, an area that at least arguably qualifies as curtilage.” However, even so, “the warrantless videos do not violate Houston’s reasonable expectations of privacy, because the ATF agents had a right to access the public utility pole and the camera captured only views that were plainly visible to any member of the public who drove down the roads bordering the farm.”<sup>152</sup> There is no expectation of privacy for that which one “knowingly exposes to the public.”<sup>153</sup>

Despite his argument that the immediate area was not readily visible due to the tarps, the Court noted that such areas were also blocked to the camera, which possessed no special ability to see through the barriers. The Court gave no credence to his argument that the view from the pole (perhaps higher) was different than that of someone on the ground. The length of time was also considered immaterial, as well, as the agents could have actually done in-person surveillance for that length of time.

The Court agreed that:

The Fourth Amendment does not require law enforcement to go to such lengths when more efficient methods are available. As the Supreme Court in United States v. Knotts explained, law enforcement may use technology to “augment[] the sensory faculties bestowed upon them at birth” without violating the Fourth Amendment.<sup>154</sup> The law does not keep the ATF agents from more efficiently conducting surveillance of Houston’s farm with the technological aid of a camera rather than expending many more resources to staff agents round-the-clock to conduct in-person observations. Nor does the law require police observers in open places to identify themselves as police; police may view what the public may reasonably be expected to view.

The Court equated the use of the camera to using cell phone pings in order to keep tabs on a vehicle. It also noted that “any member of the public driving on the roads bordering Houston’s farm during the ten weeks could have observed the same views captured by the camera. Unlike the situation in Anderson-Bagshaw, this “camera was stationary and only recorded his activities outdoors on the farm.” It further did not track his activities away from the farm.

The Court continued:

Moreover, if law enforcement were required to engage in live surveillance without the aid of technology in this type of situation, then the advance of technology would one-sidedly give criminals the upper hand. The law cannot be that modern technological advances are off-limits to law enforcement when criminals may use them freely. Instead, “[i]nsofar as respondent’s complaint appears to be simply that scientific devices . . . enabled the police to be more effective in detecting crime, it simply has no constitutional foundation.”<sup>155</sup>

The court upheld the admission of all of the recordings at the trial.

The Court also upheld the use of video and photographs that showed firearms in possession of Houston, even though it couldn’t be sure they were the same firearms seized during the warrant execution. The court agreed that it showed “continuous and uninterrupted possession” of illegal firearms. The Court also agreed it was proper to allow Agent Dobbs to identify Houston and the firearms, because he was better able to identify Houston in the “less-than-perfect quality videos” available to the jury. The Court noted that “Federal Rule of Evidence 701 permits a lay witness to identify a defendant in a photograph when the witness is more likely than the jury to identify the individual.”<sup>156</sup>

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<sup>152</sup> See U.S. v. Jackson, 213 F.3d 1269 (10th Cir.), vacated on other grounds, 531 U.S. 1033 (2000).

<sup>153</sup> Katz v. U.S., 389 U.S. 347 (1967).

<sup>154</sup> 460 U.S. 276 (1983).

<sup>155</sup> Knotts, 460 U.S. at 284.

<sup>156</sup> U.S. v. Dixon, 413 F.3d 540 (6th Cir. 2005).

As we explained in Dixon, factors relevant to admitting lay identification testimony include whether the witness is generally familiar with the defendant's appearance, whether the witness was familiar with the defendant's appearance at the time the photograph was taken or when the defendant was dressed similarly to the individual in the photograph, whether the defendant disguised his appearance at the time of the offense, whether the defendant has since altered his appearance, whether the photograph is of poor quality, and whether the photograph only shows a partial view of the defendant. Furthermore, a reviewing court should particularly defer to the decision by the district court to admit (as opposed to exclude) lay identification testimony because someone who is personally familiar with an individual is presumptively better able to identify the individual in a photograph than a juror.

Finally, the Court agreed that even though his underlying conviction was on appeal at the time, he was still a "prohibited person" under 18 U.S.C. 922(g)(1). His sentence was properly enhanced by the number of weapons, because he was in constructive possession of all of them – as "constructive possession occurs when a person has the power and intention to exercise dominion and control over an object."<sup>157</sup> The possession may be joint, but the Government must prove a nexus between the defendant and the object.<sup>158</sup>

In this case, the district court could conclude that Houston had constructive possession of all the firearms because it pointed to specific aspects of the record that illustrate that Houston shared all twenty-five firearms with Leon and had "unfettered access" to the location where the firearms were kept. In particular, the district court relied on the videos showing Houston and Leon using firearms together, the fact that Houston came and went freely from the trailer, and the fact that Houston's son claimed ownership for one of the firearms recovered from Leon's person.

Houston argues that he could not have had constructive possession of the three firearms recovered from Leon's person, because the Government failed to show through "credible evidence" that Houston previously had a nexus with or access to the three firearms seized from Leon's person. However, Houston does not point to anything in the record that rebuts the district court's findings that the brothers shared all of the weapons or that Houston had unfettered access to all of the weapons. Although Leon was carrying the three firearms at the exact moment the agents arrived, his temporary actual possession does not negate the conclusion that Houston also had constructive possession of the firearms.

Houston's conviction was affirmed.

## **SEARCH & SEIZURE – CELL PHONE**

### **U.S. v. Rarick, 2016 WL 75616 (6<sup>th</sup> Circ. 2016)**

**FACTS:** On February 14, 2013, Officer Mager (Ashland PD) made a traffic stop on Rarick's vehicle, because during a LEADS inquiry, he learned that the "registered owner of the vehicle, Rarick, had a suspended license." He discovered that in fact, that Rarick was driving on a suspended OL.

During the stop, Rarick became argumentative: he challenged the officer's authority to ask his name or run his license plate, and he refused to produce his driver's license, insurance information, or vehicle registration. At some point, Rarick removed his smartphone from his pocket, held it up, approached the officer, and stated that he was recording her. The officer took the phone, placed it on the trunk of Rarick's car, and ordered Rarick to remain in his car while she conducted her work. Rarick grabbed his phone from the trunk and retreated to the passenger seat of his car, whereupon the officer approached him to find out what he was doing. The officer saw that Rarick was manipulating his phone, and she ordered him to stop and to put his hands on the dashboard. Saying that he wanted to record what was happening, Rarick continued to

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<sup>157</sup> U.S. v. Bailey, 553 F.3d 940 (6th Cir. 2009).

<sup>158</sup> Id. At 945; U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973).

manipulate his phone. Eventually he put the phone down and placed his hands on the dashboard. After backup arrived, Rarick was arrested and taken to jail, where he was cited for obstructing official business and driving with a suspended license. His cell phone—a black Samsung Nexus S 4G model SPH-D720—was seized as evidence.

Rarick refused to allow the phone to be searched, so Lt. Icenhour got a search warrant. In the affidavit, he stated that he had good cause to believe that evidence relating to the offense of obstructing official business, a violation of Ohio Revised Code § 2921.31, was likely stored in a digital format on Rarick's phone, which had been taken from Rarick at the time of his arrest." The information was collected the use of the "Susteen Secure View 3 forensic cell phone data recovery software. Icenhour downloaded the phone's data onto his computer."<sup>159</sup> The software also allowed him to display "the downloaded data, which included technical information about the phone itself, call logs, contacts, pictures, audio files, video files, and other data. The report displayed thumbnail images of the pictures and video files; for the video files, the thumbnail image was the first frame of the video. Icenhour acknowledged that it was possible to get an idea of the contents of the pictures and video files by looking at the thumbnails. Icenhour looked for video and audio files because Rarick had told the arresting officer that he was recording her. As Icenhour scrolled down into the section containing video files, he scrolled past the pictures, and he could see from the thumbnails that the pictures contained child pornography. Icenhour then scrolled further down, where he spotted a video with a thumbnail that he thought looked like a beige wall. He testified that he opened the video because he thought that the thumbnail might depict the wall of the Cheap Tobacco store where the stop occurred. It did not—it too contained child pornography."

Realizing this, they sought a second search warrant, based upon what had already been found. Finding more pornography, they obtained a third warrant, for Rarick's home and residence. (It is unknown whether more was found.)

Rarick was indicted under federal law for child pornography. Rarick moved for suppression, which was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is a search warrant usually required for a cell phone?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that "the Fourth Amendment generally requires police to obtain a warrant before searching the digital information stored on a cell phone, even when a cell phone is seized incident to arrest."<sup>160</sup> The new rule established in Riley applies to cases still pending on direct review, such as Rarick's.<sup>161</sup> The Fourth Amendment further requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>162</sup> The particularity requirement stems from the Founders' concern with "curb[ing] the abuses of general warrants, devices which provided British officers with broad discretion to search the homes of citizens of the Colonies for evidence of vaguely specified crimes."<sup>163</sup> The particularity requirement encompasses two issues: "whether the warrant supplies enough information to guide and control the agent's judgment in selecting what to take; and . . . whether the category as specified is too broad in the sense that it includes items that should not be seized."<sup>164</sup>

He didn't object that there was probable cause to examine the phone, but that the first warrant was "overly broad because it neither specified the particular electronic evidence sought from the phone nor the particular crime to which the evidence was connected." So, the question is "whether the information contained in the affidavit, to which the warrant referred, was enough to satisfy the particularity

<sup>159</sup> He obtained the passcode from Rarick's father.

<sup>160</sup> Riley v. California, 134 S. Ct. 2473 (2014).

<sup>161</sup> See Griffith v. Kentucky, 479 U.S. 314 (1987).

<sup>162</sup> U.S. Const. amend. IV.

<sup>163</sup> Ellison v. Balinski, 625 F.3d 953 (6th Cir. 2010).

<sup>164</sup> Richards, 659 F.3d at 537 (quoting U.S. v. Upham, 168 F.3d 532 (1st Cir. 1999)).

requirement. “[T]he degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought.”<sup>165</sup>

The description of the things to be seized should, however, be “as specific as the circumstances and the nature of the activity under investigation permit.”<sup>166</sup> In the context of searches of electronic devices, while recognizing the inherent risk that criminals can easily “hide, mislabel, or manipulate files to conceal criminal activity,” we must also take care not to give the Government free rein to essentially do away with the particularity requirement by allowing it to examine every file on the device.<sup>167</sup>

Rarick objects, among other things, to the warrant’s expansive language authorizing the search of “any and all electronic data” and “any and all communications,” and the warrant’s failure to specify the date of the creation of the video at issue. As he sees it, this language swept far more broadly than “the circumstances and the nature of the activity under investigation permit[ted].”<sup>168</sup> In Richards, we held that the search warrant for evidence regarding a child pornography website was not overbroad where it authorized a search beyond the file directory on the server where the evidence was contained.<sup>169</sup> There, the broad search of the entire server was necessary because the agents did not know how, where, or in what quantity the evidence would be stored on the server. *Id.* The warrant in Richards was specific as to what the agents were searching for and limited the items to be seized to the content of the pornographic website, and business records, email correspondence, and other files related to the website. Here, certain portions of the warrant were not limited to files specific to what the government was searching for—a video or image taken by Rarick on the date and around the time of his arrest. For instance, the warrant authorized Icenhour to examine “all GPS data such as but not limited to locations, waypoints, favorite locations, points of interest and routes of travel.” However, the remedy in this circuit is not suppression of all of the items seized under the warrant, but rather severance of the infirm portions “from the remainder which passes constitutional muster.”<sup>170</sup> (“[I]t would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and the magistrate erred in seeking and permitting a search for other items as well.” Certain portions of the warrant, such as the portion authorizing seizure of “images” and “videos,” were specifically targeted to what the officers had probable cause to search, and, therefore, satisfy the particularity requirement. No evidence offered against Rarick was seized pursuant to the overbroad portions of the warrant. Rather, as will be discussed in further detail below, Icenhour executed the warrant as though the infirm portions had been excised, seizing only “images” and “videos” that appeared to be related to the incident at the Cheap Tobacco store. Thus, the district court did not err in denying Rarick’s motion to suppress.

He also argued that Icenhour “did not begin his search by focusing on the places where the evidence was most likely to be,” but the Court indicated that it is “generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection ‘against unreasonable searches and seizures.’”<sup>171</sup> In other cases, “In the context of searches of electronic devices, this court and other courts have recognized that the methodology of a search matters in determining whether it is constitutionally reasonable.” However, While it is true that “[a]s the description of . . . places and things becomes more general . . . the search method must be tailored to meet allowed ends,” eventually, “there may be no practical substitute” for actually examining most or even all potential repositories, particularly when the search is for image files.” While searching by date was one reasonable way to do it, it was not the “only reasonable one.” Under the warrant, Icenhour “was given leave to search virtually the entire contents of

<sup>165</sup> Greene, 250 F.3d at 477 (quoting U.S. v. Ables, 167 F.3d 1021 (6th Cir. 1999)).

<sup>166</sup> Richards, 659 F.3d at 537 (quoting Guest v. Leis, 255 F.3d 325 (6th Cir. 2001)).

<sup>167</sup> Richards, 659 F.3d at 538 (quoting U.S. v. Stabile, 633 F.3d 219 (3d Cir. 2011)).

<sup>168</sup> See Richards, 659 F.3d at 537 (quoting Leis, 255 F.3d at 336).

<sup>169</sup> 659 F.3d at 541.

<sup>170</sup> U.S. v. Abboud, 438 F.3d 554 (6th Cir. 2006) (quoting U.S. v. Blakeney, 942 F.2d 1001 (6th Cir. 1991)); U.S. v. Cook, 657 F.2d 730 (5th Cir. 1981))

<sup>171</sup> Dalia v. U.S., 441 U.S. 238 (1979)

Rarick's phone, the record establishes that he did not do so. Rather, he targeted his search to where he reasonably believed the recording was most likely to be found—among the audio and video files. Icenhour testified that he scrolled through the thumbnails of the files on Rarick's phone. Though he observed the child pornography photos during this search, he continued to scroll through the files until he found an image of a beige wall that he thought could be the start of the video recorded outside of the Cheap Tobacco store. Rather than continue to search after discovering that this beige wall was a part of a video containing more pornography, he turned off the video and proceeded to get a second warrant. Although the recording could have been found by first searching for data recorded on February 14, 2013, the date of Rarick's arrest, Icenhour's approach of searching by scrolling through all of the thumbnails, rather than just those on the date of Rarick's arrest, and taking care not to closely examine more than the target of the search warrant was not unreasonable."

The Court affirmed the denial of the motion.

## **SEARCH & SEIZURE – TRAFFIC STOP**

### **U.S. v. Robinson, 2016 WL 1042947 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On September 6, 2009, Robins was a passenger in a semi being driven by Ross (his co-defendant). Local police stopped the vehicle on I-96, in Livonia, Michigan. The truck was transporting shelving, but when the men consented to a search of the truck and trailer, police also found almost 500 pounds of marijuana hidden in the load, as well.

Both men were charged with distributing marijuana. Ross pled guilty, but Robinson went to trial, claiming he knew nothing of the marijuana and wasn't involved in any conspiracy. He was convicted and appealed.

**ISSUE:** Do minor traffic offenses justify a stop?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the trial court had ruled that the officer's assertion, that the truck had crossed over the lane marking multiple times, was credible, thus justifying a traffic stop. (Notably, not just one, but multiple crossings were observed.) As such, the stop was valid. With respect to his contention that the government did not prove his involvement in the conspiracy, the Court noted that the trial court had "recognized that Robinson's mere presence in the truck was not enough and that the government's case was based largely on circumstantial evidence." But, the Court agreed,

### **U.S. v. Collazo, 2016 WL 1211948 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On October 9, 2013, Agents Hill and Montgomery (West Tennessee Task Force) were patrolling I-40 in Haywood County, in separate vehicles. Collazo was in that same stretch, with his wife, Cinthia, as a passenger. Hill made a traffic stop of the Collazo van because he believed it to be following the tractor-trailer in front of it too closely. He later stated the van was operating at least close to the proper speed, although Collazo later claimed he was doing much less. Hill had "eyeballed" the gap and judged it to be at an unsafe distance.

Hill activated his lights for a traffic stop. He approached Collazo's stopped vehicle from the passenger side and obtained his paperwork. Hill saw a jar of what he believed to be urine between the seats and considered this to be representing "hard travel" – not common for passenger vehicles. He thought Cinthia's behavior to be erratic, as she was "moving a lot and being 'very animated in her speaking.'" Hill had Collazo get out because he had trouble hearing him over road noise. A few minutes into the stop he asked Collazo about his travel destination and he stated he was travelling from Dallas to a Nashville hospital to visit Cinthia's father. He allegedly agreed that Hill could talk to Cinthia, who provided a similar story. The continued to wait for dispatch to return information and Hill asked about Cinthia's behavior. Collazo replied that she was on pain medication. Agent Montgomery arrived to assist. The stop

conclude about 21 minutes from the time it began, with Collazo receiving a warning citation. They continued to sit in the patrol car for another 8 minutes, until Montgomery came back with Cinthia's purse. He had been talking to her and found her "more nervous than normal." She explained they were going to her father's home, but she didn't know the address – they were going to call her sister for the information upon arrival. Her conduct indicated extreme nervousness and deception. He asked her if something illegal was in the van and she did not immediately reply. He asked if it was a little bit illegal or a lot, and she replied "a lot" and handed him her purse. She consented to a search of the purse and he found Suboxone, in a pill bottle and in loose strips. She indicated she'd bought it, but he did not ask her about a prescription. She began crying and he tried to calm her down.

When he returned to Hill's car, he asked Collazo about it. He indicated she had a prescription but she had too many strips based upon the bottle she was carrying – as she had "almost the whole prescribed amount over a month after the prescription was filled was strange." Hill received consent from her for a further search. Collazo was handcuffed. Hill later stated Collazo gave consent for a search, which he denied. He did not get written consent from either, which violated the policy of the task force. They searched, finding 3 kilos of cocaine, and 14 additional kilos were found later.

Collazo was indicated for the cocaine and argued for suppression. It was denied, so he took a conditional guilty plea and appealed.

**ISSUE:** Does a minor traffic offense justify a stop?

**HOLDING:** Yes

**DISCUSSION:** The court agreed that an "ordinary traffic stop by a police officer is a 'seizure' within the meaning of the Fourth Amendment."<sup>172</sup> The officer's subjective intent is immaterial in determining, however, whether the stop is lawful under the Fourth Amendment.<sup>173</sup> In the Sixth Circuit, there are "two separate tests to determine the constitutional validity of vehicle stops: an officer must have probable cause to make a stop for a civil infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation." In U.S. v. Simpson, further, the Court had noted that "reasonable suspicion of a completed misdemeanor is not sufficient to justify an investigatory stop."<sup>174</sup> The Court noted that the alleged reason for the stop was a misdemeanor under Tennessee law, and if he had such probable cause, the stop was valid. (An examination of Tennessee case law regarding the actual offense was not instructive, but the earlier driver's manual suggested one car length for every ten miles of speed, with a later manual suggesting a 4 second gap when on the expressway. The Court noted, however, that the manual isn't "law" for drivers.) A video shot from Hill's car indicated that Collazo was likely breaking the law in following too closely, and as such, the stop was valid. Collazo attempted to assert that in fact, he was no following too closely, based upon a measurement compared to the broken white lines on the pavement, as indicated by the Federal Highway Administration's Manual on Uniform Traffic Control Devices. However, There was no indication that the broken lines were painted in accordance with the FHA's guidance.

The Court also discussed the time encompassed in the traffic stop. Looking to Rodriguez v. U.S., the court agreed that a stop which exceeded the time necessary violated the Fourth Amendment.<sup>175</sup> The Court agreed that 21 minutes was appropriate given the facts presented and that there was sufficient evidence of drug trafficking to ask pointed questions. Most of the activity occurred while they were involved in the traffic stop, as well. Once the 21 minutes passed, Collazo was further detained, but that too was permissible because Montgomery "had developed a reasonable suspicion of criminal activity based on his interactions with Cinthia." When she admitted possession of the drug, obtained illegally, it was permissible to extend the stop.

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<sup>172</sup> U.S. v. Blair, 524 F.3d 740 (6<sup>th</sup> Cir. 2008).

<sup>173</sup> Whren v. U.S., 517 U.S. 806 (1996).

<sup>174</sup> 520 F.3d 531 (6<sup>th</sup> Cir. 2008); Gaddis ex rel. Gaddis v. Redford Twp., 364 F. 3d 763 (6<sup>th</sup> Cir. 2004).

<sup>175</sup> 135 S.Ct. 1609 (2015).

Finally, with respect to the search, the Court agreed that the agents had probable cause to search the vehicle under U.S. v. Lyons.<sup>176</sup> The combination of evidence was more than enough to meet the evidence. Collazo's consent, or lack of consent, was immaterial.

The Court upheld Collazo's plea.

## **42 U.S.C. §1983 – ARREST**

### **Bailey v. City of Howell, 2016 WL 1042834 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On September 25, 2011, Bailey left a function at a local club in Howell, Michigan. Leaving the parking lot, he encountered an obstacle, which caused him to drive the wrong way onto the street to avoid it. Officer Lorenz, seeing this, made a traffic stop and approached. He told Bailey the reason for the stop, as well as noting that Bailey's license plate was expired, and asked about what he'd had to drink. Bailey indicated he'd only had one drink, which Lorenz questioned. He apparently gave Bailey a test (described as a "brief eye or vision test") and then returned to the cruiser. He returned and had Bailey step out, intending to do a FST. He checked Bailey's eyes for nystagmus, and detected it in both eyes. Bailey passed both the walk and turn and the one-leg stand test. Bailey refused to do the PBT. Lorenz placed Bailey under arrest for DUI.

Bailey was informed as to the ramification of not taking a breath test, but refused to do so without talking to his attorney. After some back and forth, at which point Lorenz was considering that Bailey had refused, Bailey asked where a test would be done – to which Lorenz replied at the jail. Ultimately Bailey got a warrant for a blood draw, which indicated Bailey's BA was .07. His license was confiscated.

Ultimately, the charges of impaired driving and related charges were dismissed in favor of a guilty plea of guilty to careless driving and expired plates. At an earlier hearing concerning his OL, the judge did not have the opportunity to review the video as it was being held by the PD pending the results of the chemical test. His license was suspended, initially, but after the video was available, the hearing officer concluded his license should not be suspended because he "cured" his initial refusal before the search warrant was obtained.

Bailey filed suit under §1983, alleging that Lorenz had violated his Fourth and Fourteenth Amendment rights. The District Court granted summary judgment for Lorenz and the City because Bailey had probable cause for the arrest, and to support the blood draw. Bailey appealed.

**ISSUE:** Can a DUI FST refusal be an element in suspecting DUI?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed, initially, that Bailey was properly arrested for driving under the influence, as Lorenz had probable cause. The officer consistently stated that he smelled of an intoxicating substance. Although the nystagmus test was apparently challenged in court, with there being some question as to Lorenz's training in the process, that was not enough to upset the remaining evidence of his intoxication. Bailey's refusal to take a PBT was also properly considered in the assessment. The Court noted that "a person's refusal to submit to a field sobriety test, when "combined with evidence of alcohol consumption," can give rise to probable cause to arrest the person for driving under the influence of alcohol."<sup>177</sup>

With respect to the warrant for the blood draw, the Court agreed that in order to prevail on a claim that a statement included false information, "the Supreme Court requires "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the

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<sup>176</sup> 687 F.3d 754 (6<sup>th</sup> Cir. 2012).

<sup>177</sup> Kinlin v. Kline, 749 F.3d 573 (6<sup>th</sup> Cir. 2014).

affiant in the warrant affidavit.”<sup>178</sup> If the defendant can then establish “perjury or reckless disregard” by a preponderance of the evidence, “the affidavit’s false material [must be] set to one side” and the “remaining content” must be reviewed to determine whether it is sufficient to establish probable cause. Material omissions from an affidavit are also relevant to the probable cause determination.<sup>179</sup> Moreover, “the failure to include the information and a reckless disregard for its consequences may be inferred from the fact that the information was omitted[, but] in order for this inference to be valid, the defendant must show that the omitted material would be ‘clearly critical’ to the finding of probable cause.”<sup>180</sup>

Several assertions may have been intentionally included, although false, or omitted from the affidavit. For example, Lorenz omitted from the affidavit affirmative information that Bailey passed the balance tests and ultimately consented to the chemical test. Lorenz’s omission of this information may have been intentional rather than accidental because Lorenz testified that he had included the reasons that he “believed that [Bailey] was intoxicated” in the warrant affidavit but did not “put in any reasons that would indicate that [Bailey] wasn’t intoxicated.” Lorenz may also have recklessly disregarded the truth when he stated in the affidavit that Bailey “appeared off balance while [the field sobriety test] instructions [were] given,” because a reasonable juror could conclude, based on the video of Bailey’s arrest, that he was not off-balance when these instructions were given.”

The Court could, however, set aside the challenged information, and in doing so, the Court agreed there was still enough to support seeking his blood for testing. Further, his willingness, or lack of willingness, to take a chemical test was not material to the issuance of the warrant. Finally, the Court agreed there was no cause of action for malicious prosecution since under Michigan law, it was proper to suspend his OL when he refused. (And, under Michigan law, placing conditions on the refusal – such as that he would not take a test without talking to an attorney – is considered a refusal.) The Court agreed the seizure of the OL was proper.

The Court upheld the dismissal of the case.

## **42 U.S.C. §1983 – USE OF FORCE**

### **Pennington v. Terry / Dukes / Sircy / Long / Harris / Lynn, 2016 WL 1127774 (6<sup>th</sup> Cir. 2016)**<sup>181</sup>

**FACTS:** In the evening of March 2, 2012, Sgt. Harris (unidentified TN agency) pulled over Caudill for driving with a revoked license. Pennington was a passenger. Officers Lynn and Long arrived at the stop. Subsequent events were recorded on Officer Long’s dashcam. Officer Long, believing that Pennington was “trying to hide something,” asked him to get out. Pennington did so. “Shortly after stepping outside the truck, Pennington turned away from Officer Long, bent over, coughed, and transferred something from his right hand to his mouth.” Sgt. Harris then “rushed over and grabbed Pennington’s right arm and neck, attempting to prevent Pennington from swallowing what Sergeant Harris believed to be pills.” Pennington later admitted that was exactly what he was doing. He was repeatedly ordered to spit them out. He was put on the ground, face down, with Sgt. Harris continuing to hold Pennington’s neck. He was handcuffed and rolled to his back, and was again asked if he’d swallowed anything. He denied it, and Sgt. Harris inspected Pennington’s mouth, noting that “It’s right there on your teeth.”

<sup>178</sup> Franks v. Delaware, 438 U.S. 154 (1978).

<sup>179</sup> See Sykes v. Anderson, 625 F.3d 294 (6<sup>th</sup> Cir. 2010) (“[I]n order to prevail on a false-arrest claim, [the defendant] is required to prove by a preponderance of the evidence that in order to procure the warrant, [the affiant] knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create[d] a falsehood and such statements or omissions [we]re material, or necessary, to the finding of probable cause.”) (emphasis added; quotation marks omitted) (quoting Wilson v. Russo, 212 F.3d 781 (3<sup>d</sup> Cir. 2000)).

<sup>180</sup> U.S. v. Jacobs, 986 F. 2d 1231 (8<sup>th</sup> Cir. 1993) (quoting U.S. v. Reivich, 793 F.2d 957 (8<sup>th</sup> Cir. 1986)).

<sup>181</sup> Note that most of those initially named were not directly involved in the arrest and were dismissed at an early stage of the proceeding.

At some point, Sgt. Harris removed his Taser, turned Pennington to his side and placed the Taser close to one side of his body. (He apparently pressed the flashlight from the Taser he was holding into his other side.) As observed on the video, Pennington “did not exhibit any signs of pain or physical agitation at the moment of the alleged tasing.” He continued to say he had no pills. Officer Long stood by, shining his Taser on Pennington, but was not in contact with him.

Sergeant Harris then stood upright, reconnected the flashlight to the Taser, and holstered it. He stepped away from Pennington and instructed him to lie on his stomach. The video next shows Sergeant Harris bending over Pennington; picking up two or three long, thin objects from Pennington’s lower back area; and discarding the objects onto the ground nearby. The district court ventured that these objects were “perhaps taser prongs.”

Syringes were found in the truck and pills were found on the ground nearby, apparently dropped or spit out by Pennington. Pennington, when asked, said he was fine and needed no medical attention, which is also what he told the jail on the intake form. He ultimately pled guilty to possession of a Schedule III narcotic.

Pennington filed an action against Sgt. Harris and Officer Long, under 42 U.S.C. §1983, alleging excessive force. No mention of a Taser was made and in fact, he specifically denied a Taser was used during the arrest. The Defendant officers argued that their use of force was reasonable and that they were entitled to qualified immunity.

A few months later, Pennington filed a “pro se, stand-alone, unsworn” statement claiming he was shot from a Taser from five feet away, as he lay on the ground. He claimed he was unconscious but that a friend, who was a corrections officer, “identified the marks on his body as injuries from a Taser application.” In their response, the officers simply denied the Taser was used.

The District Court, after viewing the video, concluded that Pennington’s claim was untrue that he’d been shot from five feet away, but that it was possible a Taser was in fact used. However, the Court concluded that even so, the force was lawful. Pennington appealed.

**ISSUE:** Are facts critical in a §1983 case?

**HOLDING:** Yes

**DISCUSSION:** The Court looked first to whether there was a “genuine issue of material fact” indicating that Sgt. Harris actually used the Taser. The Court explored the two ways a Taser is used, “drive-stun mode and dart mode.” The trial court had accepted that it was used, but the Sixth Circuit noted that “After careful review of the footage, we conclude that the video does not support a reasonable jury finding that Sergeant Harris tased Pennington in either drive-stun or dart mode. The image is clear enough to discern what happened and, more importantly, what did not happen.” Given his lack of any physical response at all, and noting that “At most, Pennington incoherently yells, but that action fits seamlessly into Pennington’s ongoing verbal protests throughout the arrest, rather than representing a sudden reaction to an electric jolt.” Although the Court acknowledged that Sgt. Harris removed something from Pennington’s body, the objects, whatever they were, were not located where the Taser had been applied. Perhaps, the Court noted, he considered using it briefly, but there is no indication that he did so. The Court affirmed the grant of summary judgement to the two officers.

To conclude, however, the Court also noted that “assuming that a reasonable jury could accept Pennington’s strained interpretation of the videotape, Sergeant Harris and Officer Long would be entitled to qualified immunity based on the set of facts confronting them when Sergeant Harris allegedly deployed his Taser.” The Court agreed that “an officer’s use of force does not run afoul of the Fourth Amendment as long as ‘the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”<sup>182</sup>

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<sup>182</sup> Graham v. Connor, 490 U.S. 386 (1989).

Further:

Evaluating the reasonableness of a particular use of force “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake. The Supreme Court has specified three factors relevant to assessing the reasonableness of a particular application of force: the severity of the crime at issue, whether the suspect posed an immediate threat of safety, and whether the suspect was actively resisting arrest or attempting to flee. *Id.* These factors, however, are not exhaustive.<sup>183</sup> Furthermore, courts must judge the reasonableness of force “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>184</sup>

The Court noted that despite attempts to inject issues that were not relevant to its determination, Pennington “Pennington had the burden to preserve an issue critical to his theory of excessive force: that he was tased without justification.” The Court noted that the claims he raised with respect to the Taser were untimely brought, and should have been raised at an earlier stage of the proceedings.

The Court framed the issue as:

The issue thus becomes whether Pennington had a clearly established right as of March 2, 2012 not to be tased when, on the one hand, he did not threaten the officers, was not resisting arrest, and was not attempting to flee, but on the other hand, was attempting to destroy evidence, disobeying police orders to spit out the pills, and potentially putting himself at risk of harm. As the district court observed, Sixth Circuit precedent clearly establishes that using a Taser on a non-resistant, non-threatening person violates the Fourth Amendment.<sup>185</sup> The district court, however, identified two governmental interests making the use of a Taser constitutional in this case: (1) prevention of a potential drug overdose, and (2) preservation of evidence. While we reserve judgment on the constitutional question, an examination of controlling and persuasive case law demonstrates that it was not clearly established as of March 2, 2012 that using a Taser in furtherance of these two legitimate governmental interests violated the Fourth Amendment.

The Court continued:

The Sixth Circuit recognized prevention of a drug overdose as a legitimate law enforcement objective warranting the use of force in Monday v. Oullette.<sup>186</sup> In Monday, officers responded to a radio dispatch reporting that the plaintiff, Monday, had ingested pills and was drinking alcohol in an attempt to end his life. Upon arriving, the officers counted Monday’s prescription Xanax pills and determined that at least twenty were missing. After Monday refused to go to the hospital voluntarily for twenty minutes, the defendant, Officer Oullette, discharged pepper spray in Monday’s face to force him onto a stretcher so emergency personnel could take him to the hospital. *Id.* The court held that Oullette’s use of the pepper spray was reasonable because Oullette had reason to believe Monday had overdosed on his medication and could suffer serious physical consequences if Oullette failed to act.

More generally, the Sixth Circuit has recognized that law enforcement may constitutionally apply force to neutralize a safety threat to the plaintiff himself.<sup>187</sup>

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<sup>183</sup> St. John v. Hickey, 411 F.3d 762 (6th Cir. 2005).

<sup>184</sup> Graham, 490 U.S. at 396.

<sup>185</sup> See, e.g., Hagans v. Franklin Cnty. Sheriff’s Office, 695 F.3d 505, 509 (6th Cir. 2012); Kijowski, 372 F. App’x at 600-01.

<sup>186</sup> 118 F.3d 1099 (6th Cir. 1997).

<sup>187</sup> See Caie v. West Bloomfield Twp., 485 F. App’x 92, 96 (6th Cir. 2012) (holding use of a Taser objectively reasonable to subdue an intoxicated, resistant plaintiff partly because the plaintiff was suicidal and thus “at a minimum, he was a threat to his own safety”); Williams v. Sandel, 433 F. App’x 353 (6th Cir. 2011) (holding baton strikes, pepper spray, and thirty-seven Taser deployments objectively reasonable to restrain an intoxicated, naked suspect resisting and fleeing officers along a major interstate because the suspect “posed an immediate threat to the safety of himself and the officers, as well as passing motorists” (emphasis added)); Cabaniss v. City of Riverside, 231 F. App’x 407 (6th Cir. 2007) (finding no constitutional violation when an officer pepper-sprayed a

No Sixth Circuit case or lower court case within the Sixth Circuit, however, has addressed the specific balance between a subdued, non-threatening individual's right not to be tased and the governmental interest in preventing a potential drug overdose. One lower, out of circuit case has ruled, on facts similar to this case, that multiple applications of a Taser to force a suspect to spit out a bag of cocaine was a reasonable use of force to thwart a potentially fatal overdose.<sup>188</sup>

The Sixth Circuit has “also recognized preservation of evidence as a valid governmental interest in the context of warrantless entries but has never addressed its status in excessive force cases.”<sup>189</sup> Looking at other circuits, the Court noted that the “The case at hand implicates both of these legitimate governmental interests: preventing a potential drug overdose and preserving evidence. Sergeant Harris witnessed Pennington surreptitiously place pills in his mouth, action that reasonably appeared to be an effort to swallow and destroy the drugs. Pennington later acknowledged that he intended to destroy evidence by swallowing the pills.” The officers had more than enough reason to believe that he had attempted to swallow pills and destroy the evidence. “Additionally, because the officers could not know exactly what or how many narcotics Pennington had consumed, they reasonably believed Pennington might be at risk of an adverse reaction or overdose.”

The dearth of Sixth Circuit precedent and case law in general addressing—much less condemning—the use of force to prevent a drug overdose or to preserve evidence would not put a reasonable officer on notice that discharging a Taser to accomplish these goals violated constitutional rights. Without deciding the underlying constitutional issue of whether tasing Pennington constituted excessive force, we hold that it was not clearly established as of March 2, 2012 that tasing an arrestee attempting to swallow illegally possessed drugs constituted excessive force. Because we cannot say every reasonable official would have known it was excessive force to tase an individual attempting to destroy evidence and potentially endangering him or herself in the process, Sergeant Harris and Officer Long would be entitled to qualified immunity even if there were a genuine issue of material fact as to whether Sergeant Harris tased Pennington.

Finally, Officer Long certainly was entitled to qualified immunity on the basis of his “lack of opportunity to intervene.” The Court agreed that “An officer may be liable for failing to prevent an act of excessive force if he or she:”

(1) observed or had reason to know that excessive force would be or was being used, and (2) had both the opportunity and means to prevent the harm from occurring. Where an act of excessive force unfolds in a matter of seconds, the second requirement is generally not satisfied.<sup>190</sup> This court has reasoned that it demands too much of officers to require that they intervene within a sudden and quickly-expired moment of opportunity. We have twice applied this rationale to cases involving use of a Taser, finding that nearby officers lacked a realistic opportunity to stop a tasing that occurred for a single, transitory moment.<sup>191</sup>

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handcuffed arrestee sitting in the backseat of the police car because the reportedly suicidal arrestee was banging his head against the plexiglass, thus posing “a real threat to his own safety”).

<sup>188</sup> Ellis v. Columbus Police Dep't, No. 1:07CV124-A-A, 2009 WL 1663454, at \*5-6 (N.D. Miss. June 15, 2009).

<sup>189</sup> See, e.g., U.S. v. Campbell, 261 F.3d 628 (6th Cir. 2001).

<sup>190</sup> Ontha v. Rutherford Cnty., Tenn., 222 F. App'x 498, 506 (6th Cir. 2007).

<sup>191</sup> See Wells v. City of Dearborn Heights, 538 F. App'x 631 (6th Cir. 2013) (finding no opportunity to intervene and prevent a knee strike and a single tasing because the acts occurred “at two discrete, fleeting points in time” and did not develop into an “extended string of abuses”); Kowolonek v. Moore, 463 F. App'x 531 (6th Cir. 2012) (finding no opportunity for officers to prevent a tasing that “could only have lasted for a fraction” of the entire incident, which itself “lasted only ‘minutes’”); cf. Goodwin v. City of Painesville, 781 F.3d 314 (6th Cir. 2015) (finding sufficient opportunity for officers to intercede during a “prolonged application of force”: a twenty-one second tasing followed by an additional five-second tasing). We have similarly found insufficient opportunity to intervene in other types of excessive force that lasted less than ten seconds. See Burgess v. Fischer, 735 F.3d 462 (6th Cir. 2013) (holding that an officer and nurse lacked opportunity to intercede in a takedown that lasted no more than ten seconds); Ontha, 222 F. App'x at 506-07 (holding that an officer who was a passenger in a patrol car that ran over a fleeing suspect lacked opportunity to develop preventative measures “within a short time span of six to seven seconds”).

Much like the isolated and brief tasings that left insufficient opportunity for intervention in Wells and Kowolonek, the alleged tasing in this case occurred a single time and lasted mere seconds. Measured by the amount of time Sergeant Harris held the Taser near or on Pennington's body, the alleged excessive force lasted about three seconds. Measured from the moment Sergeant Harris retrieved his Taser until he returned it to his holster, the purported excessive force lasted seven seconds. By either measure, Officer Long lacked a realistic opportunity to stop Sergeant Harris from discharging the Taser. In this fleeting span of time, Officer Long would have had to realize what Sergeant Harris intended to do, recognize that action was unconstitutional, develop a plan to prevent the tasing, and execute that plan. As our case law acknowledges, it is impractical to expect an officer to proceed through these steps in less than eight seconds. Pennington makes no allegation that he was tased multiple times or otherwise suffered a "a prolonged application of force" that would lend Officer Long more time to recognize the nature of Sergeant Harris's actions and take action to stop it.<sup>192</sup> Therefore, even if Sergeant Harris's use of the Taser violated clearly established rights, Officer Long is entitled to qualified immunity because he lacked a realistic opportunity to prevent the tasing.

**Zucker v. City of Farmington Hills, 2016 WL 1019041 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On August 4, 2009, Zucker reported a home invasion to the Farmington Hills (MI) PD. Officer Tiderington responded. He found the apartment in "disarray" and he believed that Zucker was mentally ill. He went to the apartment building management to see about having them contact family. As a result, Zucker's daughter decided to come to Michigan after speaking to Zucker, having also become concerned about his mental state.

A week later, residents in the complex complained of a water leak and a foul odor from the apartment. Cole, a complex employee, investigated, and found the apartment "in total disarray and filthy beyond what I've seen in a lot of units." He found the "The sinks held food and garbage, there was little room to walk, and the toilet contained boxes, plastics, and other materials." The leak was fixed and Ms. Zucker arrived. Zucker, upset about the entry of the maintenance staff, told her that he had a right to defend his family and the apartment, and showed her a handgun. She immediately left and warned Cole not to go back in. Cole called 911 and told the dispatcher that Zucker was "totally unstable." Ms. Zucker took the phone and explained the situation in detail and that she couldn't let her father know she was talking to 911. She explained she could not retrieve the gun, but that he hadn't threatened her with it, noting that if he decided she was "the enemy" she would be in danger. She specifically said she didn't want to place officers in harm's way.

Officers Tiderington and Allen, along with Sgt. Michaluk arrived. They obtained additional information and Sgt. Michaluk concluded that he was "confident [that they had] enough to do a commitment on [their] own. They decided Tiderington would call Zuker and try to persuade him to come out.

The precise details of what happened next are disputed by the parties. According to the defendants, Officer Tiderington told Zucker that Tiderington would come to Zucker's apartment and subsequently approached the second-floor apartment with Officer Allen. Tiderington met Zucker in the hallway in front of the apartment, explained that Zucker's daughter was concerned for Zucker, and asked Zucker to come with the officers to the hospital. Zucker then said something, began to move his hands toward his jacket pockets, and turned to reenter the apartment. Fearful that Zucker was trying to reach for the gun, Tiderington grabbed Zucker's arm to prevent him from leaving, and both men fell to the floor. While Zucker and Tiderington struggled on the floor, Officer Allen saw Zucker reach into his jacket for what looked to be a shoulder holster. Allen warned Zucker that if he did not remove his hand from the jacket, Allen would shock him with a taser. When Zucker did not comply, Allen shocked him once.

Zucker told a different story.

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<sup>192</sup> Goodwin, 781 F.3d at 329.

According to Zucker, Officer Tiderington called and arranged to meet him in fifteen minutes outside of the apartment. Zucker stepped out of his apartment to find that Tiderington was “bounding up the stairs.” Without saying anything, Tiderington approached Zucker, locked arms with him, pulled him to the ground, and handcuffed him. Zucker was left “handcuffed lying with [his] back on the ground,” hands behind his back, “[c]ompletely passive and in shock.” Tiderington then left Zucker bound and supine on the ground and entered the apartment, after which Officer Tomasovich-Morton arrived on the scene, wiped Zucker’s mouth, stood up, and did a “knee drop on [his] chest.” Subsequently, another officer, presumably Officer Allen, shocked Zucker continuously with a taser for approximately two minutes.

The Court agreed that there was no dispute but that Zucker was subdued, searched and transported, where he was “declared mentally unsound and in need of medical attention based in part on a petition for hospitalization signed by Officer Tiderington.”

Zucker filed suit against several defendants in Michigan state court, and it was removed by the city to federal court. The federal claims included excessive force under 42 U.S.C. §1983 as well as a failure to train or supervise allegation. The officers invoked qualified immunity, claiming that the information they had indicated that Zucker was dangerous to himself and others, and that Zucker resisted their arrest. The argued that “any of Zucker’s testimony to the contrary was inadmissible because he was mentally incompetent at the time and therefore lacked the “competent personal knowledge” required by Federal Rule of Evidence 602.”

The Court noted a conflict in that “ the Michigan Mental Health Code authorizes an officer to “take [an] individual into protective custody and transport the individual to a preadmission screening unit” if the officer “observes [the] individual conducting himself or herself in a manner that causes the peace officer to reasonably believe that the individual is a person requiring treatment.” By contrast, the FHPD has a policy that an officer may take someone into protective custody if “the officer or another reliable person” observes that the individual is a “person who requires treatment.” The Officers, however, noted that “the officers’ alleged violation of the Michigan statute was irrelevant to the question of whether the seizure of Zucker was constitutional, since a violation of state law is not basis for a claim under 42 U.S.C. §1983.”

The District Court granted the officers summary judgement, finding that the officers had sufficient cause to seize Zucker. Zucker appealed.

**ISSUE:** Is a mental health seizure justified?

**HOLDING:** Yes

**DISCUSSION:** Zucker argued that the officers personal observed nothing that would have given them probable cause to believe he was a danger to himself or to others. He also argued that they’d used force to subdue him. The Court noted that the issue of whether they’d personally observed him was not relevant in this claim.

The Court noted that Qualified Immunity provides “officers “breathing room to make reasonable but mistaken judgments,”<sup>193</sup> officers enjoy protection from actions seeking civil damages such as this one so long as their conduct did not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>194</sup> For an official to have known that his actions would violate “clearly established” law, “existing precedent must have placed the statutory or constitutional question beyond debate.” The “clearly established” standard involves two questions: First, whether the relevant officer violated the plaintiff’s statutory or constitutional rights.<sup>195</sup> Second, whether the right in question was clearly established at the time of the alleged violation. When analyzing whether an officer has violated clearly established law, courts have discretion in deciding which of the two questions to address first “in

<sup>193</sup> Stanton v. Sims, 134 S. Ct. 3 (2013) (per curiam) (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011)),

<sup>194</sup> Pearson v. Callahan, 555 U.S. 223 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 900 (1982)).

<sup>195</sup> Hagans v. Franklin Cty. Sheriff’s Office, 695 F.3d 505 (2012).

light of the circumstances in the particular case at hand.” When a defendant invokes qualified immunity, the plaintiff must prove that the defendant is not entitled to qualified immunity.<sup>196</sup>

Construing facts in the light more favorable to Zucker, as required at this state, the Court agreed that it was “well established that absent suspected criminal activity, a law-enforcement agent may not seize a person simply in order to assess his mental fitness.”<sup>197</sup>

As we explained in Monday v. Oullette, the Fourth Amendment protects individuals from state-sanctioned detention for a psychiatric evaluation absent “probable cause to believe that the person is dangerous to himself or others.”<sup>198</sup> In this context, a showing of probable cause “requires only a ‘probability or substantial chance’ of dangerous behavior, not an actual showing of such behavior.”<sup>199</sup> When examining whether officers had probable cause to believe that an individual posed a danger, we have cautioned that “probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts,” requiring courts to evaluate the facts known to officers from the perspective of a “reasonable and objective person” in those officers’ position. Zucker makes two arguments that officers seized him without probable cause in violation of the Fourth Amendment. As we explain, neither is availing.”

The Court agreed that Ms. Zucker’s statements were sufficient to provide probable cause to take him into detention. Zucker’s attempted to draw selectively from the evidence and was inconsistent with the record.

The Court continued:

We have confronted probable cause in the context of mental-health seizures in a number of cases, three of which are particularly instructive here. In Fisher v. Harden, police received a call from a passerby who reported that a man in the distance appeared to have tied himself to railroad tracks in an attempt to take his own life.<sup>200</sup> The police approached the man, who turned out to be Fisher, and observed him sitting in a folding chair with a rifle, where he had positioned himself in order to shoot groundhogs. We rejected the officers’ argument that they had probable cause to detain Fisher, reasoning that because Fisher was not tied to the railroad tracks, appeared to be hunting, and approached the police in an entirely ordinary manner, the police had no evidence that Fisher was a danger other than discredited information from an obviously unreliable informant.

By contrast, in Monday, Monday dialed a mental-health hotline and reached a psychologist, whom he informed that he had ingested a particular prescription medication, was drinking alcohol, and “could have cared less” that doing so while taking the medication was potentially fatal. The psychologist informed the police that Monday may have overdosed on the medication in an attempt to commit suicide. *Ibid.* The police arrived at Monday’s residence, found that at least twenty of his pills were missing from a recently issued prescription bottle, and observed that he was intoxicated. *Ibid.* Although Monday denied having overdosed, we concluded that the officers’ observations, in the context of the psychologist’s report, created probable cause to believe that Monday’s life was in danger.<sup>201</sup> Simon v. Cook helps to clarify the line we have drawn between Fisher and Monday.<sup>202</sup> Simon called the Lexington Police Department to report that government officials had been harassing him. The police responded, and the situation escalated after officers expressed doubts about Simon’s “bizarre and improbable” story that various government officers and agencies were conspiring to attack and kill him.. An officer detained Simon after Simon nearly struck him in the face and stated: “[H]ow would you like it if I followed you around?” We emphasized that probable cause “requires only a ‘probability or substantial chance.’” and found

<sup>196</sup> Davenport v. Causey, 521 F.3d 544 (6th Cir. 2008).

<sup>197</sup> McKenna v. Edgell, 617 F.3d 432 (6th Cir. 2010); Fisher v. Harden, 398 F.3d 837 (6th Cir. 2005).

<sup>198</sup> 118 F.3d 1099 (6th Cir. 1997),

<sup>199</sup> *Id.* (quoting Illinois v. Gates, 462 U.S. 213 (1983)).

<sup>200</sup> 398 F.3d 837 (6th Cir. 2005),

<sup>201</sup> *Id.* at 1102–03; see also Ziegler v. Aukerman, 512 F.3d 777 (6th Cir. 2008).

<sup>202</sup> 261 F. App’x 873 (6th Cir. 2008).

that the officers reasonably concluded that Simon posed a danger since he nearly made physical contact with an officer and “intimated that he intended to follow police officers.”

The Court noted that “Here, the information that the officers had indicated a greater and far more immediate danger than did the information that the police had in Simon.” Ms. Zucker’s statements clearly indicated that she believed that Zucker posed a danger to himself and others around him.” Clearly, in context, she was scared by his production of a gun in connection with his delusional and manic state. Officer Tiderington had previously had contact with Zucker and already believed he was mentally ill. The Court agreed that the detention was supported by probable cause.

The Court further agreed that “plaintiff cannot allege a violation of state law in an action under 42 U.S.C. § 1983.”<sup>203</sup> Nothing in the Fourth Amendment prohibits an officer from relying on a third party’s observation when ascertaining whether probable cause to conduct a seizure exists,” so long as it would be reasonable to conclude that the third party is reliable.”<sup>204</sup>

With respect to the alleged excessive force, the Court agreed that “striking or shocking a non-resisting detainee violates the Fourth Amendment.”<sup>205</sup> However, Zucker made these allegations only after the case has been resolved and as such, the Court did not choose to address it, especially considering the inconsistencies in his statements throughout the record.

Further, the Court agreed:

Officers may use reasonable force in order to effectuate a seizure.<sup>206</sup> The reasonableness of a particular seizure must be evaluated by balancing “the nature and quality of the intrusion on the individual’s Fourth Amendment interests” against “the countervailing governmental interests at stake.”<sup>207</sup> A number of factors may be relevant, including “whether the [individual] poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” The Supreme Court has cautioned that courts must take care to avoid ignoring context when conducting the analysis:

“Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” violates the Fourth Amendment.”<sup>208</sup> Rather, the governmental interests at stake must be evaluated through the lens of “an officer on the scene making split-second judgments and without the advantage of 20/20 hindsight.”<sup>209</sup>

The Court agreed that Tiderington was within his rights to grab Zucker and take him to the ground, if he reasonably suspected him capable of violence, and is “not compliant and reasonably suspected of violent behavior.” Further, the use of a Taser by Officer Allen, did not violate the law either.<sup>210</sup> The Court had

... observed a line in the case law that separated suspects who actively resisted arrest from those who did not: We had previously held that the use of a taser to subdue an individual who actively resisted arrest did not constitute excessive force.<sup>211</sup> By contrast, officers who had used a taser against an individual who was either compliant or who had stopped resisting did violate the

<sup>203</sup> See, e.g., Pyles v. Raisor, 60 F.3d 1211(6th Cir. 1995) (“While the states are, of course, free to enact laws that are more protective of individual rights than the U.S. Constitution, a mere violation of such a state law will not establish a proper claim under § 1983.” (quoting Conley v. Williams, No. 93- 5524, 1994 WL 326001, at \*2 (6th Cir. July 5, 1994))); see also U.S. v. Beals, 698 F.3d 248 (6th Cir. 2012) (“While the states are free to impose rules for searches and seizures that are more restrictive than the Fourth Amendment, those rules will not be enforced in a federal criminal proceeding.”).

<sup>204</sup> See, e.g., Boykin v. Van Buren Township, 479 F.3d 444 (6th Cir. 2007); see also, e.g., Ziegler, 512 F.3d at 783– 84.

<sup>205</sup> See, e.g., Thomas v. Plummer, 489 F. App’x 116 (6th Cir. 2012); Landis v. Baker, 297 F. App’x 453 (6th Cir. 2008). ”

<sup>206</sup> Graham v. Connor, 490 U.S. 386 (1989).

<sup>207</sup> Ibid. (quoting Tennessee v. Garner, 471 U.S. 1 (1985)).

<sup>208</sup> Ibid. (citation omitted) (quoting Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973)).

<sup>209</sup> Goodrich v. Everett, 193 F. App’x 551 (6th Cir. 2006):.

<sup>210</sup> Hagans v. Franklin County Sheriff’s Office, 695 F.3d 505 (6th Cir. 2012),

<sup>211</sup> See Caie v. West Bloomfield Township, 485 F. App’x 92 (6th Cir. 2012); Williams v. Sandel, 433 F. App’x 353 (6th Cir. 2011).

Fourth Amendment.<sup>212</sup> On the basis of this distinction, we concluded that the officer in Hagans did not violate clearly established law as of 2007.

Clearly, Officer Allen did not violate clearly established law when he used the Taser.

The Court concluded that:

Maintaining an untidy apartment is not by itself grounds for probable cause to search and seize a person. Nor does the mere fact that an individual is a gun owner justify the use of force against him. In Zucker's case, however, officers had far more cause for concern than these two facts. Because the evidence submitted to the district court shows that the officers had reliable evidence that Zucker had a weapon while in a delusional state, officers had probable cause to temporarily detain, search, and seize Zucker. Similarly, because Zucker failed to allege facts that would create a genuine dispute about whether he was actively resisting the officers' efforts to subdue him, the district court did not err when it held that Zucker cannot overcome qualified immunity and maintain his excessive-force claims.

The Court affirmed the decision.

**Coitrone v. Murray / Allen / Coomes, 2016 WL 683243 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On August 19, 2012, Coltrone was planning to take his girlfriend, McCollum, to church on his motorcycle. They left their Bowling Green home and along way, while waiting at a stop light, Trooper Mayfield (KSP) pulled up. He ran the plate and discovered multiple serious felony warrants for the owner (Coltrone). Trooper Mayfield turned on his lights to initiate a stop. The rider slowed down and gestured that he was going to stop, but could not due to road construction, so he pulled onto another road. He later stated he intended to stop but that he heard screeching tires and thought the trooper was going to strike him. So, he continued on, intending, he said, to get McCollum to a "safe place." He pulled into a fast food restaurant and McCollum alighted. Coltrone didn't get off, however, as he feared he was going to be beaten by the troopers. As such, he continued to flee, travelling at almost double the posted speed limit. By this point, Coomes had jointed the chase. Coitrone then encountered Lt. Clark, who had maneuvered his vehicle in an attempt to block Coitrone's flight. Coitrone was able to evade him, however.

After getting back into his vehicle, Lt. Clark put out on the radio to end the pursuit, as he feared the heavy traffic ahead, but discovered later that no one heard it due to radio traffic. Coomes, however, realizing he was heading into heavy traffic, decided to end it if Coitrone had not stopped by a particular intersection. Abruptly, Coitrone slowed and Coomes struck him in the rear of the motorcycle. (Coitrone later stated he believed that the trooper was trying to PIT the motorcycle.) Coitrone suffered life threatening injuries as a result.

Coitrone filed suit against Coomes under 42 U.S.C. §1983, allegedly an unwarranted use of deadly force. The trial court ruled in favor of Coomes, finding that at most, Coomes acted negligently, which was not a federal action. Even assuming that it was intentional, however, the trial court agreed that the crimes at issue were serious and that Coitrone was committing actions that "constituted an immediate threat to the police and to innocent bystanders and that he was "actively resisting or attempting to evade arrest by flight."

Coitrone appealed.

**ISSUE:** May striking a fleeting motorcyclist be lawful?

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<sup>212</sup> See Kijowski v. City of Niles, 372 F. App'x 595 (6th Cir. 2010); Landis v. Baker, 297 F. App'x 453 (6th Cir. 2008); cf. Champion v. Outlook Nashville, Inc., 380 F.3d 893 (6th Cir. 2004) (holding that officers used excessive force by using pepper spray against a suspect who was immobilized and had stopped resisting).

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that “Coomes’s use of force did not violate Coitrone’s Fourth Amendment rights,” even if intentional. Making a decision on an appropriate level of force requires a “careful balancing of the nature and quality of the intrusion” of the individual’s interests, which must be evaluated under the objective reasonableness standard.<sup>213</sup> Certainly striking the motorcycle, if intentional, was a use of force, “the governmental interest in ending Coitrone’s flight outweighed this intrusion because the undisputed facts established that his flight posed a substantial and immediate danger to the public.”<sup>214</sup> Coitrone even admitted he was fleeing even though he was aware officers were trying to get him to stop. The Court agreed that the “collision here occurred on a Sunday morning near a church at which pedestrians and other drivers were present.” Coitrone had already “exhibited a willingness to endanger others by driving recklessly in order to evade the police.”

Further, the Court agreed, even if Coitrone was correct in his related argument that Coomes violated KSP policy during the pursuit, after Clark had determined it should end, was not enough to establish that the use of force was unwarranted. KSP could hold its troopers to a higher policy than the Constitution required, if it so chose, but that was not a factor in deciding the case under 1983.

The Court upheld the summary judgement of the 1983 claim. The court remanded the state claims back to Kentucky to determine whether supplemental jurisdiction of the battery and negligence claims could go forward.

**McCarty v. City of Southfield, 2016 WL 761916 (6<sup>th</sup> Circuit 2016)**

**FACTS:** McCartney was driving her three grandchildren to school when Officer Birberick pulled her over, accusing her of passing a stopped school bus. She disagreed, said there’d been no bus and that his actions were racist, and refused to accept the ticket, instead, dropping it on the ground. Officer Birberick drove away. McCartney, however, had apparently drained her battery during the stop and could not start her car. Stranded, she tried to call a friend. About 20 minutes later, the officer returned. When she saw him, she “rolled her eyes in disgust and looked away.” “Officer Birberick returned to his SUV, which he then rammed into McCartney’s sedan from behind, purportedly to move her car off the busy street into the adjacent gas station lot.” He did not forewarn her of his intent, and she and the children were thrown from their seats at the impact.

In fact, the collision moved her further into traffic and they were “wailing in panic.” The officer began screaming at them and he rammed them again, pushing the vehicle so hard it barely missed the pumps. The vehicle were damaged and at least one of the children was injured. Officer Birberick drove away.

McCartney was able to get the car started and left the scene. She eventually filed a lawsuit under 42 U.S.C. §1983. Officer Birberick moved for summary judgment and qualified immunity. The Court denied his motion and he appealed.

**ISSUE:** May summary judgement be denied when the officer’s behavior “shocks the conscience?”

**HOLDING:** Yes

**DISCUSSION:** For purposes of the appeal, Birberick was required to accept McCartney’s version of the facts, but he claimed that “those facts do not prove a clearly established constitutional violation.” The Court listed 13 facts, with the most damning being the last, that he left the scene and “later destroyed the dash cam recording from his police car.” The Officer admitted that this conduct was wrong, but argued that “it is no so outrageous as to “shock the conscience.”<sup>215</sup> The Court agreed, however, that it most

<sup>213</sup> Graham v. Connor, 490 U.S. 386 (1989); Fox v. DeSoto, 489 F.3d 227 (6<sup>th</sup> Cir. 2007).

<sup>214</sup> Scott v. Harris, 550 U.S. 372 (2007).

<sup>215</sup> County of Sacramento v. Lewis, 523 U.S. 833 (1998).

certainly did shock the conscience and that in fact, “this would be shocking-and criminal-behavior if committed by an ordinary citizen.”

The Court affirmed the denial of his appeal.

**Rush v. City of Lansing, 2016 WL 787891 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On March 14, 2011, in the early morning hours, Officers Rendon, Johnson and Burke (Lansing, MI, PD) responded to an alarm at a local bank. They got inside, announced themselves as police and ordered individuals inside a storage room to come out. Clay, a “very small,” 17-year-old female, was found hiding inside. Officer Rendon saw that she “was holding and waving a pair of scissors and forced her to the ground while holstering his gun.” Officers Johnson and Rendon tried to pry the scissors from her, unsuccessfully. Clay was frantic and shaking, but finally, Johnson was able to get the scissors. At that point, all four were in close proximity to one another. Suddenly, Clay pulled out a serrated steak knife. Rendon, who had a hand on her at the time, backed off, yelling “knife.” “Clay, still kneeling, slashed the knife back and forth at Rendon at stomach height from about an arm’s length away.” Rendon stepped back and fired one shot at Clay. Rendon later claimed she lunged toward him and he fired a second shot, but the other officers indicated that she “tensed up and fell backwards” instead. Rendon’s second shot struck her in the head, killing her. All agreed the two shots were “very close to one another.”

Rush filed suit on behalf of Clay’s Estate, against Officer Rendon and the City of Lansing, under 42 U.S.C. §1983, claiming excessive force for the second shot. Rendon moved for summary judgment, which was denied. Officer Rendon appealed.

**ISSUE:** Does the law make allowances for split-second decisions?

**HOLDING:** Yes

**DISCUSSION:** The Court first looked at its jurisdiction to review the matter. In such cases, the Court is able to “decide an appeal challenging the district court’s legal determination that the defendant violated a constitutional right or that the right was clearly established.”<sup>216</sup> We may also decide an appeal challenging a legal aspect of the district court’s factual determinations, such as whether the district court properly assessed the incontrovertible record evidence.<sup>217</sup> But we may not decide an appeal challenging the district court’s determination of “evidence sufficiency”—facts that a party may, or may not, be able to prove at trial.<sup>218</sup>

In this case, the Court noted, “Officer Rendon makes impermissible factual challenges.” There are in fact three conflicting versions of Clay’s actions between the first and second shot. However, “Rendon clarified that his legal arguments are not based on his version of the facts, and explicitly says as much in his briefing: “The undisputed material facts in this case make clear that the interval between shots was a matter of seconds, and the movement of Clay’s body—whether forwards or back—was not sufficient to make clear to Officer Rendon that she no longer caused a threat.” Thus, because Rendon’s legal argument is not premised on accepting only his description of Clay’s reaction, nothing prevents us from answering the legal question before us.” The Court also discussed whether his major premise, that the shots were fired so close together as to be reasonable, was “an impermissible fact-based challenge.”

The Court agreed that since the trial court didn’t discuss the time frame, it was not prohibited from doing so.

The Court summarized:

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<sup>216</sup> Mitchell v. Forsyth, 472 U.S. 511 (1985)).

<sup>217</sup> See Plumhoff v. Rickard, 134 S. Ct. 2012 (2014).

<sup>218</sup> Johnson v. Jones, 515 U.S. 304 (1995).

The key events occurred in the following sequence: (1) Clay pulled out a knife and slashed at Rendon; (2) Rendon shot Clay in the stomach; (3) Clay had some reaction (fell back, slumped forward, or lunged again at Rendon); and (4) Rendon shot Clay in the head. Rendon does not dispute that the two shots occurred separately, nor does he dispute the factual sequence of events. He simply argues that, based on the undisputed facts, his actions were not unreasonable. Whether the two shots were, in the officers' words, "almost simultaneous," "in quick succession," "very close together," "immediate and there was no lapse of time," or "quick and immediate," the record contains numerous, consistent statements from all three officers showing that there was very little time between shots. This is uncontroverted record evidence, and Officer Rendon is not prohibited from making a legal argument based on the evidence in the record, so long as it is viewed in the light most favorable to Rush. Semantic differences in these words and phrases aside, and even viewed most favorably to Rush, there is no question that the evidence shows the shots occurred very close together. Because Officer Rendon's legal argument is based on the facts in the record, taken in the light most favorable to Rush, we have jurisdiction over this appeal, and the facts we take into account can—indeed, must—include that Officer Rendon's two shots occurred very close together in time.

To decide qualified immunity, the Court had to "apply a two-prong test: '(1) whether the facts, when taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right; and (2) whether the right violated was clearly established such 'that a reasonable official would understand that what he is doing violates that right.'"<sup>219</sup>

First, the Court agreed that Rush's argument that the first shot was unreasonable was "wholly unpersuasive." The Court noted that "immediately before Rendon fired the first shot, Clay drew a knife and slashed at Rendon from an arm's length away. Under those circumstances, it was not unreasonable for Rendon to use deadly force by shooting at Clay."<sup>220</sup>

Turning to the second shot, we generally apply three non-exhaustive factors to guide our evaluation of whether an officer's actions were reasonable: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight." Mullins, 805 F.3d at 765 (internal quotation marks and citation omitted).

The Court looked to Graham v. Conner and Goodwin v. City of Painesville, To determine i "whether the officers' actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."<sup>221</sup>

As noted in Graham:

We must judge the reasonableness of the use of force from the perspective of a reasonable officer on the scene and not through the lens of 20/20 hindsight, allowing for the fact "that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

In addition, it agreed that "what constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure."<sup>222</sup>

The Court continued"

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<sup>219</sup> Mullins v. Cyraneck, 805 F.3d 760 (6th Cir. 2015) (quoting Saucier v. Katz, 553 U.S. 194 (2001)). The order in which we analyze these two prongs is left to our "sound discretion." Pearson v. Callahan, 555 U.S. 223 (2009); see also Mullenix v. Luna, 136 S. Ct. 305 (2015).

<sup>220</sup> See Tennessee v. Garner, 471 U.S. 1 (1985) (establishing that law enforcement officers may employ deadly force where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others).

<sup>221</sup> 781 F.3d 314 (6th Cir. 2015) (quoting Graham v. Connor, 490 U.S. 386 (1989)).

<sup>222</sup> Id. at 766 (quoting Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1999) (quotation marks omitted)).<sup>222</sup>

Because it is undisputed that the crime of breaking and entering into a bank while armed—not to mention assaulting an officer with a knife—is sufficiently severe to support the use of force, the first factor weighs in Rendon’s favor. Accordingly, we turn to the second factor and evaluate the threat posed by Clay. We measure the reasonableness of the force used at a particular time based on an “objective assessment of the danger a suspect poses at that moment.”<sup>223</sup> Given the reasonableness of Rendon’s use of deadly force in firing the first shot, the question is thus whether it was objectively unreasonable for Officer Rendon to continue to use deadly force by firing the second shot. Rendon argues that the two shots were fired so close together that he lacked time to determine that deadly force was no longer justified.

In such situations, the Court looked to Smith v. Cupp.<sup>224</sup> “[Q]ualified immunity is available only where officers make split-second decisions in the face of serious physical threats to themselves and others.” However, the fact that a situation unfolds quickly “does not, by itself, permit [officers] to use deadly force.” The district court segmented the shooting, noting that courts “look to the split second before the officer had to decide what to do,” in finding that Clay did not pose a threat just prior to the second shot.<sup>225</sup> However, we have previously held that “[w]ithin a few seconds of reasonably perceiving a sufficient danger, officers may use deadly force even if in hindsight the facts show that the persons threatened could have escaped unharmed.”<sup>226</sup> This is so because “[q]ualified immunity gives ample room for mistaken judgments by protecting all but the plainly incompetent of those who knowingly violate the law.”<sup>227</sup>

In the time following the District Court’s decision, the Sixth Circuit had decided two relevant cases. In Mullins, the Court had held that “it was not unreasonable for an officer to fire two shots in the five seconds after a suspect was no longer a threat.” As in this case, in Mullins, there was no doubt that the officer was initially in danger. The Court had reasoned that “[w]hile [the officer]’s decision to shoot [the suspect] after he threw his weapon away may appear unreasonable in the ‘sanitized world of our imagination,’ [the officer] was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a severe threat to himself and the public was reasonable.”

The Court looked at the facts upon which the District Court depended, such as Clay’s small stature and injury, but also noted that “The officers were in a confined space (a small room in a dark bank) with Clay. The second shot occurred just after Clay unquestionably did pose a threat by slashing at Rendon with a knife, and the second shot occurred very shortly after the first. Whether Clay slumped forward or backward following the first shot, there was no clear or unmistakable surrender, or any other action that would compellingly show that the threat had abated. Moreover, Clay’s assault with the knife—a knife she produced unexpectedly from inside her coat—occurred after the officers had subdued and apparently disarmed her of her scissors from her first assault, and was accompanied by her misleading pleas of ‘I’m sorry, I’m sorry.’”

Under the circumstances, Rendon was “justified in remaining apprehensive of further deception and threat from Clay. Thus, it was not unreasonable for Officer Rendon to continue using deadly force.” The Court agreed that his “assessment that Clay still posed a threat was unreasonable under the circumstances,” so he could reasonably believe there was an ongoing threat. The third factor indicated that “Clay was actively resisting arrest right up to the first shot, and it was certainly reasonable for Officer Rendon to expect her to continue to do so.”

The Court concluded that “it was not unreasonable for Rendon to perceive Clay as still posing a threat when he fired the second shot, even if he was ultimately mistaken in making a split-second assessment.

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<sup>223</sup> Bougeess v. Mattingly, 482 F.3d 886 (6th Cir. 2007).

<sup>224</sup> 430 F.3d 766 (6th Cir. 2005)

<sup>225</sup> Rush, 2015 WL 632321, at \*6 (quoting Dickerson, 101 F.3d at 1161–62).

<sup>226</sup> Untalan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005)

<sup>227</sup> Pollard v. City of Columbus, Ohio, 780 F.3d 395 (6th Cir. 2015), cert. denied, 136 S. Ct. 217 (2015) (citation omitted); see also Chappell, 585 F.3d at 907 (citing Pearson, 555 U.S. at 231) (“Qualified immunity applies irrespective of whether the official’s error was a mistake of law or a mistake of fact, or a mistake based on mixed questions of law and fact.”).

We therefore hold that Rendon's use of deadly force was not objectively unreasonable under the circumstances and that no constitutional violation occurred." Further, the Court agreed, he did not violate a "clearly established constitutional right."

The Court ended by stating:

The death of Ms. Clay is a tragedy, a death that, with the benefit of hindsight, may have been avoided. Yet this case also highlights the fact that police work is dangerous work. In recognition of this dangerousness, the doctrine of qualified immunity operates to protect officers from civil liability, even for mistakes of judgment, so long as their actions are not shown to have been objectively unreasonable. Applying this doctrine to the undisputed facts of this case under controlling case law leads us to conclude that Officer Rendon's firing of two shots in quick succession was not a constitutional violation. And, in any event, a constitutional right to be free from such a use of force was not clearly established. For the reasons set forth above, we REVERSE the district court's denial of Officer Rendon's motion for summary judgment and REMAND to the district court for entry of judgment in favor of Officer Rendon.

**Kent v. Oakland County, 810 F.3d 384 (6<sup>th</sup> Cir. 2016)**

**FACTS:** During Kent's father's visit with his son, in Commerce Township, Michigan, he suffered a medical emergency. On September 1, 2013, Kent, a physician, found his father in bed, breathing but unresponsive. He knew his father had a living will. He was made comfortable and that evening, he passed away. His wife called to report a natural death and Firefighter-EMT Oryszczak responded. Kent explained the situation. Deputy Lopez arrived. Kent was asked about a DNR, and Kent that they were visiting and he wasn't sure if his mother had brought the paperwork, but that his father wanted no heroic measures. His mother affirmed that as well. In the absence of it, the EMT called his partner to assist in attaching an AED to determine if there were signs of life or if anything could be done, in the absence of the paperwork.

The situation escalated at this point. Kent began yelling at the deputies and EMTs, telling them that they "were not going to assault [his] dead father or [he] was going to call the police and have them all thrown in jail." He questioned whether the EMTs "even knew what a DPOA [durable power of attorney] was" and insisted that his mother, as the medical proxy for his father, could tell them what his father's wishes were. Deputy Maher arrived around this time and saw that Kent was gesturing with his hands and "flailing" his arms in the air. Deputy Lopez and an EMT recall that Kent called Oryszczak an "asshole" several times, though Kent does not recall this in his witness statement.

The EMT explained to the deputy that without obvious signs of death, he had an obligation to render aid to the deceased. The deputies tried to calm Kent down, who insisted he would not allow his father to be assaulted. More officers were summoned. Deputy Lopez tried to get Kent to leave the room and he refused. Lopez threatened to tase him and "who says he was standing with his hands raised in the air and his back to the wall at this point, undisputedly said, "Go ahead and Taze me, then." Lopez deployed the taser in dart mode." (Kent stated he was never told to leave the room, but was told to calm down.) He eventually complied with being handcuffed but was told he was not under arrest. He remained handcuffed, with probes in place, for more questioning. Eventually the EMTs removed the probes and dressed the wounds, and the handcuffs were removed. Kent's father was pronounced deceased after an AED confirmed no activity.

Kent filed suit under 42 U.S.C. §1983 against Deputies Lopez and Maher. The deputies moved for summary judgment and the Court "found that there were genuine issues of material fact as to "whether EMS and defendants felt they were faced with an emergency," whether "emergency personnel had, or even thought they had, a legal obligation to attempt resuscitation," and whether "Kent was, in fact, non-compliant." The deputies appealed.

**ISSUE:** Does using force, and then not making an arrest, call the underlying force into question?

**HOLDING:** Yes

**DISCUSSION:** The Court began by assessing the questions to be asked in a qualified immunity case: (1) whether the officer violated the plaintiff's constitutional rights under the Fourth Amendment; and (2) whether that constitutional right was clearly established at the time of the incident.<sup>228</sup> We may conduct this analysis in any order.<sup>229</sup> Ultimately the court had to look to "whether the totality of the circumstances justifies a particular sort of seizure."<sup>230</sup>

In this case, Kent was never charged with a crime, but, the Court noted "But that fact is precisely what calls Deputy Lopez's use of a taser into question under this factor. Kent was never arrested and was not told at any time that he was under arrest."<sup>231</sup> There was no evidence that "Kent was aware that he would be detained until Deputy Lopez instructed him that he would be tased if he failed to comply with commands."<sup>232</sup> This is one important consideration in the totality-of-the-circumstances analysis, and it weighs in Kent's favor."

Although the deputies insisted that Kent "posed an immediate threat to safety," and while he may have been preventing the EMTs from "fulfilling the perceived duties," that did not equate to the situation in other cases where taser use had been justified.<sup>233</sup> There was no question of there being a weapon, no indicating he was "violently thrashing," or trying to flee or directly harm anyone. At most, he was using "agitated hand gestures." According to his testimony, he had his hands up and back to the wall, in a position indicating submission. That submissive posture also undermines the deputies' argument that Kent was "actively resisting arrest." We have often found that the reasonableness of an officer's use of a taser turns on active resistance: "When a suspect actively resists arrest, the police can use a taser [] to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot."<sup>234</sup>

Looking to Eldridge v. City of Warren, the deputies insist that Kent was actively resisting arrest because he refused to comply with their commands to calm down and demonstrated "verbal hostility."<sup>235</sup> Contrasting the facts with Caie v. West Bloomfield Township, the Court agreed that "combination of facts that made the use of force reasonable in Caie is not present here."<sup>236</sup> Kent admits that he did not fully comply with the deputies' orders to calm down. He also admits that he yelled at officers that he "did not have to calm down," that the emergency personnel "were not going to assault [his] dead father or [he] was going to call the police and have them all thrown in jail," and that he responded to Deputy Lopez's

<sup>228</sup> Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505 (6th Cir. 2012).

<sup>229</sup> Pearson v. Callahan, 555 U.S. 223 (2009)."

<sup>230</sup> St. John v. Hickey, 411 F.3d 762 (6th Cir. 2005) (quoting Tennessee v. Garner, 471 U.S. 1 (1985))."

<sup>231</sup> See e.g., Grawey v. Drury, 567 F.3d 302 (6th Cir. 2009).

<sup>232</sup> See Goodwin, 781 F.3d at 326 (finding excessive force and noting that there was no evidence that the claimant had "reason to be aware he was being detained").

<sup>233</sup> See Watson v. City of Marysville, 518 F. App'x 390 (6th Cir. 2013).

<sup>234</sup> Rudlaff, 791 F.3d at 642. Compare, e.g., Hagans, 695 F.3d at 511 (holding that officer did not violate clearly established law when he used taser five times in drive stun mode to subdue plaintiff, who refused to be handcuffed, fled from officers, and was "out of control," breaking windows and jumping on top of cars due to what officers later learned was crack cocaine intoxication); Foos v. City of Delaware, 492 F. App'x 582 (6th Cir. 2012) (finding that use of taser was reasonable in response to hostile, belligerent, and agitated suspect, who repeatedly revved the engine of his wrecked car as officers arrived on the scene, then began violently thrashing about and reached into back of his vehicle as if to retrieve a weapon), with, e.g., Goodwin, 781 F.3d 314 (finding excessive force where suspect, still convulsing from a previous taser application and physically unable to comply with commands to put his hands behind his back and therefore not "actively resisting" arrest, was tased a second time); Thomas, 489 F. App'x 116 (finding excessive force where the plaintiff had ceased her verbal resistance and dropped to her knees with her hands above her head at the time she was tased); Kijowski v. City of Niles, 372 F. App'x 595 (6th Cir. 2010) (finding excessive force since individual could not have "actively resisted" police in between a rapid series of taser applications); Landis v. Baker, 297 F. App'x 453 (6th Cir. 2008) (finding that officers used excessive force on suspect who had initially fled but, at the time of the officers' repeated tasing, was pinned to the ground with his face in muddy water and ultimately died as a result of drowning). "Active resistance includes 'physically struggling with, threatening, or disobeying officers.'" Rudlaff, 791 F.3d at 641 (quoting Cockrell, 468 F. App'x at 495). It also includes "refusing to move your hands for the police to handcuff you," id. (citing Caie, 485 F. App'x at 94), or fleeing from police. See, e.g., Williams v. Ingham, 373 F. App'x 542 (6th Cir. 2010) (holding that use of taser in drive stun mode on arrestee who had twice engaged in high-speed car chases with police was reasonable, where, once stopped, arrestee refused to exit his vehicle for handcuffing).

<sup>235</sup> 533 F. App'x 529 (6th Cir. 2013).

<sup>236</sup> 485 F. App'x 92 (6th Cir. 2012),

final warning with, “Go ahead and Taze me, then.” Kent’s language might not resemble the “polite responses” given in *Eldridge*, but it does not approach the direct threat of physical harm made by the plaintiff in *Caie*. And unlike *Caie*, Kent never attempted to flee officers, and he never attempted to prevent officers from handcuffing him. Rather, much like the claimant in *Goodwin*, who, like Kent, refused to comply with an officer’s command and verbally indicated as much, Kent’s conduct does not resemble the “continued resistance and hostility” often present in our active resistance cases, including *Caie*.<sup>237</sup>

The Court was “keenly aware that, at the time of the incident, the deputies understood that they were obligated to secure the scene so that EMTs could perform their perceived duties, and that the deputies were forced to “make split-second judgments in circumstances that [were] tense, uncertain, and rapidly evolving.”<sup>238</sup> Indeed, distinct circumstances in this fact-sensitive analysis might compel a different conclusion about police use of force in a perceived medical emergency. For example, in *Stricker*, we upheld the officers’ use of force—pointing weapons, using pressure holds, and handcuffing—where they were responding to a possible drug overdose of a young man known to officers as a drug user, after his parents had repeatedly refused to allow the officers or emergency responders to enter their house to treat him.<sup>239</sup> But *Stricker* did not involve a tasing, and Deputies Lopez and Maher were confronted with a very different scenario than the *Stricker* responders. Here, the deputies knew they were responding to a natural death investigation and were aware that Kent’s father had just passed away some fifteen minutes before they arrived.<sup>240</sup> They also were “well aware—perhaps most importantly—that the entire incident occurred in Kent’s home, one of the most sacred of spaces under the Fourth Amendment’s protections.”<sup>241</sup> Given the facts, the Court agreed that “Deputy Lopez’s use of a taser was objectively unreasonable here.”

As to whether it was clearly established that Kent had a right to be free from being tased, the deputies argued that the “community caretaker” provisions applied and “no case has expressly prohibited the use of a taser when officers are securing a scene for emergency personnel.” The Court, however, framed it was to whether it was “clearly established that it was excessive force to tase an individual who refused to comply with officers’ commands to calm down and yelled at emergency responders, but was never told he was under arrest, never demonstrated physical violence, and had his arms in the air and his back to the wall when tased.” The Court found that it was “clearly established in this Circuit that “the use of a Taser on a non-resistant suspect” constitutes excessive force.”<sup>242</sup> Conversely, it is also clearly established that tasing a suspect who “actively resists arrest and refuses to be handcuffed” does not violate the Fourth Amendment.<sup>243</sup> The Court noted that in *Goodwin*, a verbally belligerent subject was held to not be tased, in this set of very similar facts, the right was clearly established. Since 2005, the Court had held that the “[t]he general consensus among our cases is that officers cannot use force . . . on a detainee who has been subdued, is not told he is under arrest, and is not resisting arrest.”<sup>244</sup> Kent was not told he was detained or under arrest. Further, although some Eleventh Circuit cases indicated somewhat differently, “Where Sixth Circuit law is clear, it controls.”<sup>245</sup>

With respect to Deputy Maher, who was present during the relevant circumstances, there was sufficient evidence to agree that she could have observed the situation and taken action to prevent the other deputy from using the taser.

The Court affirmed the denial.

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<sup>237</sup> *Goodwin*, 781 F.3d at 325-26.”

<sup>238</sup> *Graham*, 490 U.S. at 396-97.

<sup>239</sup> E.g., *Stricker v. Township of Cambridge*, 710 F.3d 350 (6th Cir. 2013).

<sup>240</sup> See, e.g., *Griffith v. Coburn*, 473 F.3d 650, 658 (6th Cir. 2007) (taking into account the fact that officers were aware that the suspect was “experiencing some sort of mental or emotional difficulty,” where mother had called 911 seeking advice about having him hospitalized).<sup>240</sup>

<sup>241</sup> *Kyllo v. U.S.*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. U.S.*, 365 U.S. 505 (1961)) (“‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”).

<sup>242</sup> *Kijowski*, 372 F. App’x at 601.

<sup>243</sup> *Hagans*, 695 F.3d at 509.”

<sup>244</sup> *Grawey*, 567 F.3d at 314

<sup>245</sup> *Higgason v. Stephens*, 288 F.3d 868 (6th Cir. 2002)

### **Parvin v. Campbell, 2016 WL 97692 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On June 13, 2012, Officer Campbell (Chattanooga) was a four-year veteran. He responded to an address for a domestic dispute that involved Parvin. Parvin later claimed that he opened the door with Newman (his wife) standing behind him. Parvin was bleeding and had marks, Newman did not. Parvin told Campbell that Newman was the “initial aggressor.” Campbell asked Parvin to step outside. At that point, Parvin alleged, Campbell body slammed him to the ground and sprayed him with OC, and he was placed in the cruiser. Campbell and Newman stated that Newman was hysterical and that Newman had told the officer that her husband was intoxicated and had attacked her. Campbell observed redness on her body. Newman gave consent to the officer’s entry, whereupon “Parvin came around a corner and told Newman she needed to leave.” In an attempt to separate the parties, Campbell asked Parvin to step outside, but he refused to come outside. “Campbell told Parvin that he would be detained until Campbell could make a determination as to who the primary aggressor was.” He resisted her attempt to put his hands behind his back, instead, he “balled up.” She took him to the ground and he continued fighting until the OC was sprayed. He was then arrested.

Parvin was indicted on domestic assault and resisting arrest. The domestic assault charges were dismissed prior to trial, and he was convicted of resisting.

Parvin filed suit, arguing excessive force and false arrest. The City was dismissed and Campbell filed for summary judgement under qualified immunity.. She was given qualified immunity and Parvin appealed.

**ISSUE:** Under Heck, is a claim prohibited if success for the plaintiff would invalidate an underlying conviction?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to the case of Heck v. Humphrey or guidance. In that case, “when an individual like Parvin brings a §1983 claim against the arresting officer, ‘the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.’”<sup>246</sup> Although the Court has recognized “two circumstances under which an excessive force claim might conflict with a conviction.” The first is when the “criminal provision makes the lack of excessive force an element a the crime.”<sup>247</sup> The second “is when excessive force is an affirmative defense to the crime.”<sup>248</sup> Looking specifically to the second prong, the Court noted that a claim of excessive force is, in fact, a defense to a charge of resisting or evading arrest.” And, since he did not raise excessive force as a defense in his criminal case, his “claim challenges his underlying conviction.” Further, under Heck, “success on the claim must necessarily imply the invalidity of the conviction.” Under these cases, “Parvin’s excessive force claim arises out of the same conduct that led to his conviction.” (There was no allegation that any force was used after he was subdued.) “This is the exactly the type of claim that is barred by Heck.”

The Court upheld the summary judgment.

### **Withers v. City of Cleveland, 2016 WL 145925 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On September 30, 2010, Officers Shoulders, Shapiro and Zola (Cleveland PD)“ executed an arrest warrant for Daniel Withers, an armed bank robbery suspect who had allegedly threatened to “blow [the teller’s] head off.” The arrived at his address, his grandmother’s home, and spotted a man they “presumed to be Withers in the upstairs window.” His grandmother consented to a search and they cleared the upper floors. Once backup arrived to secure the outside, they entered the basement, Shoulders first, followed by Shapiro and Zola. “Because only a single light illuminated the basement, the officers used their flashlights to provide additional lighting during the search. After entering the basement,

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<sup>246</sup> 512 U.S. 477 (1994).

<sup>247</sup> Schreiber v. Moe, 596 F. 323 (6<sup>th</sup> Cir. 2010).

<sup>248</sup> Cummings v. City of Akron, 418 F.3d 676 (6<sup>th</sup> Cir. 2005).

the officers repeatedly ordered Withers to come out and “show us your hands.” Having cleared the rest of the house, the officers zeroed in on the last place they had yet to search, the built-out closet in the far left corner of the basement. Shoulders positioned himself by the closed closet door while Zola moved into a tactical position at a twenty to thirty degree angle from the door. Shapiro stood in the area behind Zola.

From this point, there was dispute. Zola shot the individual in the closet, but admitted that he saw no weapon. He was, however, unable to see the left side of the body. A neighbor, Daniels, testified that he overheard a conversation between officers, including apparently Zola in which he admitted shooting Withers. Withers was found to be unarmed and died from the gunshot.

Withers’ parent filed suit under 1983. The District Court found in favor of Zola (and the others). They claimed qualified immunity, which was granted. The Estate appealed.

**ISSUE:** Do factual disputes negate summary judgement?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that “summary judgment is inappropriate where there are factual disputes regarding the reasonableness of an officer’s use of deadly force.”<sup>249</sup> We have repeatedly held that when the legal question of qualified immunity depends on which version of the facts one accepts, the jury, not the judge, acts as the final arbiter of immunity.<sup>250</sup> This is especially true where, as here, the “District Court must view the facts in the light most favorable to the plaintiff on a motion for summary judgment.”<sup>251</sup>

The Court agreed that the trial court was in error when it found that “Zola acted reasonably as a matter of law when he fatally shot Withers. The parties advance two irreconcilable versions of what occurred in the moments before the shooting, and because a genuine dispute of material fact regarding the reasonableness of Zola’s use of deadly force exists, we are compelled to reverse the District Court’s grant of summary judgment to Zola. First, the statement in Dennis Daniels’s affidavit contradicts Zola’s testimony and creates a genuine issue of material fact as to whether Zola’s decision to use deadly force was reasonable. Second, the officers’ testimony creates a genuine issue of material fact as to whether Zola’s use of deadly force was objectively reasonable. We address each of these errors in turn.

The District Court concluded that the statement in Dennis Daniels’s affidavit that officers yelled the obscenity “get down fucker, get down fucker” before Zola fatally shot Withers did not, for the purposes of summary judgment, contradict Zola’s testimony that he shot Withers “[l]ess than a split second” after Shoulders opened the closet door. The court found that this evidence did not create a genuine issue of material fact because “it neither disputes the fact that [Zola] could barely see Withers’s silhouette nor that Withers made a sudden movement with his right hand.” The District Court’s conclusion is in error because it fails to consider that there was a lapse of time between Zola’s discovery of Withers and his shooting Withers. This lapse in time between the two events creates a dispute that goes to the heart of whether the shooting took place in a “split second” and whether it was reasonable for Zola to use deadly force against Withers.

In this case, the “This contradiction creates a genuine issue of material fact because the length of time between Zola’s discovery of Withers and his use of deadly force against Withers bears on the reasonableness of Zola’s use of deadly force. That is, if a jury credits Daniels’s testimony, it could reasonably infer that Zola’s actions were unreasonable because he would have had more time than he claimed—much more than “[l]ess than a split second”—to ascertain whether Withers was armed before he shot and killed Withers for making a hand gesture consistent with the officers’ lawful orders to “show

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<sup>249</sup> See, e.g., Sova, 142 F.3d at 903.”

<sup>250</sup> Scozzari v. Miedzianowski, 454 Fed. Appx. 455 (6th Cir. 2012); Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007); Sova, 142 F.3d at 903.

<sup>251</sup> Sova, 142 F.3d at 903.

us your hands.” Further, “Zola’s deposition demonstrates that the officers repeatedly ordered Withers to “show us your hands” as they searched the basement in the moments before the shooting. This command casts doubt on the reasonableness of Zola’s use of deadly force because a reasonable officer could certainly expect a suspect to make gestures with his arms and hands consistent with the lawful order to “show us your hands” given only moments earlier.<sup>252</sup> Since Zola testified that Withers had been ordered to show his hands, it was consistent to believe that he might, in fact, be attempting to show his hands when he saw Withers’ arm move upward. A jury could conclude that in fact, an officer should have realized that Withers was trying to comply with the orders he’d been given.

The Court emphasized, as well, that “that the law was clearly established that an officer may not use deadly force against a suspect unless “the officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others.”<sup>253</sup> Because there are disputes of fact that relate directly to this issue, it appears that Zola cannot establish that he is entitled to qualified immunity based on the clearly established prong of the qualified immunity analysis. In Tolan v. Cotton, the Supreme Court explained that a court should not resolve disputes of fact in the qualified immunity analysis.”<sup>254</sup>

The Court reversed the decision in favor of the officers.

### **Curry v. Cotton, 2016 WL 364761 (6<sup>th</sup> Cir. 2016)**

**FACTS:** Over the night of November 24-25, 2012, Curry and Aleman got into an argument with other patrons at the Inner Circle Night Club in Cincinnati. Igwegbe, head of security, stated that Curry was aggressive and made racial slurs against him when she was evicted. Deputies Cotton and Berry, Hamilton County SO, were working security. “According to Curry, while she and Aleman waited outside the club for someone to retrieve Curry’s coat, Cotton “demanded” that Curry and Aleman go to their vehicle. Curry replied that she “did not know why [she] was being asked to leave or why Deputy Cotton was being so demanding.” According to Cotton, Curry would not comply with his request, was combative and belligerent, and shouted racial slurs at Cotton and Berry, who are African American.” At her plea hearing, later, for resisting, Curry admitted to being intoxicated and becoming combative with Cotton. Surveillance video captured the interaction outside and showed Cotton walking behind her, putting his arm around her neck and taking her to the ground. They continued to struggle on the ground. Both got up and the situation continued. Eventually, Cotton walked her out of view, “he is standing behind her with his arm around her neck, in what he refers to as the “escort position,” Curry was not handcuffed, nor did she appear to be bleeding when she walked out of view of the cameras.

Curry contends that she was not resisting when Cotton walked her to the parking lot.” Curry claimed that once out of sight, though, he cuffed her and beat her until she bled profusely, before additional officers arrived. Later photos showed her with a bloody face, due to a cut on her forehead, “extensive bruising on one arm, and additional cuts and bruises on her arms and body.” Cotton claimed, corroborated by Berry and Igwegbe, that she “began resisting again and grabbed at his collar, at which point he grabbed Curry and they both fell to the ground.” He admitted that he struck her with his baton twice and that both he and Berry forced her arms behind her back and got her handcuffed. “Igwegbe told the Sheriff’s Office that there was no further altercation or physical force used after Curry was in handcuffs.” She continued to battle with officers and other responders and would not allow an examination, and continued to be verbally abusive. Arriving officers with dashcams caught her “sitting on the ground with her hands cuffed behind her back, alternately rocking back and forth and moving along the ground slowly while seated, and appearing to yell.” She was told to stop moving around and stop talking, and tried to get up. The EMS report indicated that the “[patient] was very combative and would not sit still for fire to evaluate.” At the hospital, eventually, she was belligerent and combative, requiring sedation and restraints. Her medical report indicated contusions, an elbow sprain and abrasions.

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<sup>252</sup> See Sample, 409 F.3d at 697 (stating that arresting officers should expect suspects to make movements consistent with lawful orders).

<sup>253</sup> Garner, *supra*.

<sup>254</sup> 134 S.Ct. at 1866.,

She ultimately pled guilty to resisting arrest. She then filed suit against Cotton under 1983. He moved for summary judgement, which was denied. Cotton appealed.

**ISSUES:** Is someone handcuffed necessarily restrained?

**HOLDING:** No

**DISCUSSION:** The trial court had determined that “there is clearly established law in this circuit holding that officers may not use violent physical force against a suspect who has been subdued, and that there is a genuine dispute of fact whether Cotton used violent physical force against Curry after she was physically restrained.” Cotton agreed, but noted that the trial court ended its assessment “at the point Curry was handcuffed because uncontroverted evidence shows Curry continued to resist arrest even after being handcuffed, and that she was not subdued at that point.” The Court looked to Harris v. City of Circleville.<sup>255</sup>

Consequently, “it is clearly established in this circuit that ‘the gratuitous use of force on a suspect who has already been subdued and placed in handcuffs is unconstitutional.’”<sup>256</sup> Cotton argued that although handcuffed, she was still subject to a use of force, as she was not yet subdued. However, the two issues were separate, as she alleged the illegal use of force occurred while she was out of sight, and any that subsequent conduct she engaged in was immaterial. The Court agreed, noting that “the cruiser video footage does not cover the timeframe in which Curry alleges she was beaten. Curry contends that Cotton beat her after putting her in handcuffs and before other officers arrived on the scene. But the dashboard camera footage was taken after other officers arrived. Further, although the video footage shows an officer taking photos at the scene, and those photos show Curry already injured, the footage does not show what caused Curry’s injuries. Additionally, Cotton’s testimony that Curry “attacked” a city officer while in handcuffs similarly addresses Curry’s conduct after other officers arrived, not when she was allegedly beaten.”

The Court agreed that the appeal raised factual, not legal, challenges, and affirmed the denial of summary judgement in relevant part.

### **Rowlery v. Genesee County, 2016 WL 463456 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On December 3, 2010, Rowlery was a pretrial detainee at the Genesee County Jail in Flint (MI). He claimed that he was told he was going to be released, and collected his belongings. He spoke to a female detainee, who had asked him a question, and that triggered a jail officer asking him “what he was doing.” He was then told he was not going to be released and ordered to hand over his belongings. During that time, Winston said he was not complying and eventually, he was taken to the concrete floor by the jail officers. During the ensuing struggle, he was injured, and was taken to the hospital for treatment. The jail deputies provided a version of the night’s events that differed in several respects, but essentially argued that the use of force was appropriate. (Video of the struggle was inconclusive, as several relevant parts were blocked from view by the way bodies were positioned.)

Rowlery filed suit. The deputies moved for qualified immunity. Because he was a pretrial detainee (had not yet been convicted), the excessive force claim was analyzed under the Fourteenth Amendment—which looked to “whether the actions of law enforcement officers ‘shock the conscience of the court.’”<sup>257</sup> Because the actions did not take place in an situation that was “‘rapidly evolving, fluid, and dangerous’”, but were more deliberate, there was a material issue of fact remaining, and denied the motion. The deputies appealed.

**ISSUE:** Is a pretrial detainee entitled to be free from force?

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<sup>255</sup> 583 F.3d 356 (6th Cir. 2009).

<sup>256</sup> Id. (citation omitted); see also Bultema v. Benzie Cty., 146 F. App’x 28 (6th Cir. 2005).

<sup>257</sup> Id. (quoting Francis v. Pike Cnty., 875 F.2d 863 at \*2 (6th Cir. 1989) (quoting Lewis v. Downs, 774 F.2d 711 (6th Cir. 1985))).

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the right of a pretrial detainee to be free of force, once they are subdued, was clearly established. The video did not clearly indicate that Rowley was “engaged in non-compliant behavior that justified the application of force.” Although he was clearly moving during the takedown, the court noted that did not mean he was resisting.

The court upheld the dismissal of the motion.

**Ortiz v. Kazimer / Crisan, 811 F.3d 848 (6<sup>th</sup> Cir. 2016)**

**FACTS:** In the summer of 2010, Officers Kazimer and Crisan (Cleveland PD) were in search of two armed robbery suspects. They “learned from the dispatcher that the suspects had stolen a wallet at gunpoint and had run toward a nearby apartment complex—the same complex, the dispatcher said, where two men had just given a nearly empty wallet to the apartment’s manager. Coincidence? The officers thought not.” They went in search of the men, having a particular clothing description of one of them. As they pulled up on a man fitting the description, he fled, and the officers chased him. During the chase, one of the apartment residents stepped in front of Kazimer, slowing him down. He knew the subject being chased, Ortiz, a 16 year old with Down’s syndrome, and tried to tell the officer about Ortiz, but the officer told him to get out of the way. Ortiz continued to run and ended up where his family was waiting. He “hugged his mother, who held onto him.” Officer Kazimer, who later admitted that he saw Juan “surrendering,” nonetheless, “grabbed Juan from behind, forcefully pulled him from his mother’s arms, and slammed him very hard into [a] vehicle like a football player making a tackle.” He then handcuffed Juan and “used his body weight”—205 pounds and twice Juan’s weight—“to pin Juan against the hot vehicle.” I Even though “Juan was not making any effort to resist” and was “crying out in pain,” id., and even after Kazimer gave an “ALL OK” signal to the dispatcher,” he continued to hold him pinned for some 15 minutes. Residents defended Ortiz verbally, but Kazimer responded that he didn’t care and pushed them away, cursing them. “He told Juan’s parents that they were “lucky he didn’t shoot [Juan]. That may be right.”

At some point Crisan arrived and learned what had occurred, but he did nothing but, according to witness, “hurl racial slurs at the onlookers.” “The ordeal ended only when the police dispatcher radioed the officers that the true robbers had been apprehended nearby. The officers let Juan go free.” However, “Juan did not let the officers go free.” He sued (with his parents, his “next friends,” under the law, under 1983, arguing that he suffered injuries and medical complications. The officers claimed, and were denied, qualified immunity, and they appealed.

**ISSUE:** Must the defendants accept the plaintiff’s version of the facts in a qualified immunity assessment?

**HOLDING:** Yes

**DISCUSSION:** In their appeal, the Court noted that the “officers concede[d] (quite refreshingly) the relevant facts for immunity and summary-judgment purposes: that Kazimer “slammed” or “tackled” a “surrendered” suspect, then “pinned” him down while Crisan watched nearby.” With respect to the excessive force claim, the Court agreed that “Officers lose their qualified immunity and can be held personally liable for using such force when “existing caselaw . . . clearly and specifically hold[s] that what the officer[s] did—under the circumstances the officer[s] did it—violate[s] the Constitution.”<sup>258</sup> Officers are protected from liability from “mere negligence,” however, because “the law does not lightly subject officers to liability after the fact for doing a dangerous job that often requires split-second judgments in complicated, quickly evolving criminal investigations. Only the “plainly incompetent or those who knowingly violate the law” thus can be held liable.<sup>259</sup> For Kazimer, the Court agreed that it had “held, not

<sup>258</sup> Rudlaff v. Gillispie, 791 F.3d 638 (6th Cir. 2015).; Graham v. Connor, 490 U.S. 386 (1989).

<sup>259</sup> Malley v. Briggs, 475 U.S. 335 (1986).

surprisingly, that when an officer slams a non-violent and capitulating suspect against a vehicle, that crosses the line between reasonable and excessive force.<sup>260</sup>

And we have held that an officer uses excessive force when he presses face-down a non-resisting and surrendered suspect longer than needed.<sup>261</sup> We could cite many other cases along the same lines,<sup>262</sup> but we need not prolong the point. Kazimer as it happens cites no caselaw to the contrary. If what the eyewitnesses say is true, he used excessive force.” That this conduct constituted excessive force was clearly established long before the incident occurred, even when the subject originally resisted (here, by running). “A reasonable officer would have known better.” Nothing in the surrender indicated that Ortiz was in any way “faking” his surrender, as he had “stopped moving, was hugging his mother, and remained limp after being shoved against the car. Did the possibility of a fake surrender, moreover, really require the officer to pin this compliant suspect against a car for fifteen minutes? This was not the behavior of a recalcitrant criminal. Kazimer’s “generalized speculation about the force required in other situations” (say, where a suspect is actually faking) “is immaterial to this case”—where eyewitnesses say Juan gave no signs of faking.<sup>263</sup>

The court agreed that the chaotic nature of the scene made some use of force reasonable, the officers were admittedly surrounded by a number of people, yelling and apparently, in at least one or two cases, reaching toward Ortiz. “But they do not justify the amount of force allegedly used here. Kazimer’s purported level of force—slamming Juan (rather than, say, grabbing him) and pressing Juan against the hot car for fifteen minutes (rather than, say, removing him from the scene).” Kazimer had already contacted dispatch, saying “All OK, calming down,” which indicated that he perceived no threat. The actions of the bystanders appeared to be focused on getting the officer to stop hurting Ortiz.

Although Kazimer argued that “much of what the eyewitnesses purported to see is unlikely. Could Kazimer actually have slammed a disabled boy half his size against an SUV? Could he actually have pressed him against the hot car for fifteen minutes, even after giving the “ALL OK” signal to the police dispatcher? We have wondered the same thing. But the eyewitness accounts aren’t “blatantly contradicted by the record,” and that means we cannot disregard them on summary judgment.<sup>264</sup>

For Crisan, the Court noted that he could be held liable for failure to intervene against Kazimer’s use of force. Our caselaw clearly establishes that police officers are liable for failing to stop ongoing excessive force when they observe it and can reasonably prevent it.<sup>265</sup>

On the plaintiffs’ facts, Crisan directly observed at least some of the excessive force and had the ability and opportunity to stop it. He entered the scene at some point after Kazimer had slammed Juan against the SUV. He saw a boy in handcuffs, pinned against the car, not posing a threat to anyone. He observed that the boy was not moving or resisting in any way. And he heard the boy’s cries of pain. He even heard the apartment manager, the woman who had seen the actual suspect, tell him that the officers had the wrong person. Yet Crisan did not “attempt[] to prevent” the force and, worse, added ethnic slurs to the mix.<sup>266</sup> His lack of action on this record establishes a cognizable claim that he violated Juan’s clearly established constitutional rights.

The Court concluded:

It is well to remember that the officers may not have done anything wrong. They may have diligently pursued an armed-robbery suspect, used a reasonable amount of force in a chaotic situation to detain him, and eased up seconds later once they found out he did not commit the

<sup>260</sup> *Miller v. Sanilac County*, 606 F.3d 240 (6th Cir. 2010); see also, e.g., *Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002).

<sup>261</sup> *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004); see *Martin v. City of Broadview Heights*, 712 F.3d 951 (6th Cir. 2013).

<sup>262</sup> *Lyons v. City of Xenia*, 417 F.3d 565, 578 (6th Cir. 2005) (opinion of Sutton, J.) (doing so),

<sup>263</sup> *Malory v. Whiting*, 489 F. App’x 78 (6th Cir. 2012)."

<sup>264</sup> *Scott v. Harris*, 550 U.S. 372 (2007).

<sup>265</sup> *Turner v. Scott*, 119 F.3d 425 (6th Cir. 1997); cf. *Gazette v. City of Pontiac*, 41 F.3d 1061 (6th Cir. 1994).

<sup>266</sup> See *Goodwin v. City of Painesville*, 781 F.3d 314 (6th Cir. 2015).

robbery. That's exactly what their testimony suggests, and they will have the chance to give their version of events to a jury. But because we must accept the plaintiffs' evidence-supported story at this stage of the case, we agree with the district court that the officers do not deserve summary judgment on these claims.

**McDonald / Lytle v. Flake / City of Memphis, 814 F.3d 804 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On July 4, 2011, at about 3 a.m., McDonald, Lytle and four female friends were walking past the Memphis PD's Entertainment District Unit (EDU) location. Several off-duty officers were in the parking lot, including Officer Flake, to socialize. Some of the officers were drinking alcoholic beverages. "Such alcohol consumption by off-duty officers at the EDU precinct, commonly dubbed "Choir Practice" by its participants, was not only commonplace at the EDU precinct, but had been occurring for decades at precincts throughout the City." As the group paused, Officer Flake told them to move along, and referred to the two white females in the group, using a racial slur. McDonald responded, later claiming he did not know who Flake was, as he'd been drinking and was not in uniform. The group walked away, followed by Flake, who "violently attacked McDonald." A melee ensued between the officers and the group, with the officers "shouting 'Stop resisting arrest!'" The men in the group were beaten and kicked, and each required medical treatment. They were charged with a variety of offenses and jailed, but the state dismissed all charges. McDonald and Lytle filed a complaint and the involved officers were suspended. (They appealed their suspensions but the record did not reflect the outcome.)

McDonald and Lytle filed suit against Officer Flake and the City of Memphis, claiming false arrest, excessive force and municipal liability. The trial court ruled against the city's request for dismissal, noting that there was a dispute as to "whether the City was indifferent to officers' alcohol consumption at the precinct given testimony that the practice was "widespread" for the past 30 years and not a single officer had ever been disciplined for it." The City and Officer Flake appealed.

**ISSUE:** In a qualified immunity situation, must the defense accept the plaintiff's facts?

**HOLDING:** Yes

**DISCUSSION:** The Court first agreed that it did, in fact, have jurisdiction to examine the appeal. The Court noted that in his appeal, "Officer Flake barely even feigns an attempt at accepting the plaintiffs' version of the facts (but for one) and instead propounds his own version of the facts and the inferences that he would draw from them." Officer Flake denied all of the relevant allegations, insisting on his "own, opposite version of events," to which the trial court had "explained—clearly, thoroughly, and repeatedly—deciding between these two versions is a task for the jury, not for the district court on summary judgment or for this court on appeal."

The Court agreed that "specifically, since we have already determined that the rights the plaintiffs are claiming here were clearly established at the time of the incident, we must now decide whether Officer Flake's conduct, on these facts, violated those rights. We conclude that it did. On these facts, Officer Flake led a group of alcohol-impaired officers in an attack on the unsuspecting plaintiffs, in violation of Turner,<sup>267</sup> inflicted excessive force on these subdued plaintiffs during this police encounter and seizure, in violation of Chappell,<sup>268</sup> and ultimately arrested these battered plaintiffs without probable cause, in violation of Everson.<sup>269</sup> On this evidence, a jury could reasonably find for the plaintiffs." As such, the Court upheld the denials both on the part of the officer and the city.

The plaintiffs further moved for costs involved in responding to the appeal. The Court agreed that the "unmistakable futility of these appeals is compelling." The plaintiffs had been put on notice that "they must accept the plaintiffs' version of the facts and argue only legal issues."<sup>270</sup> The Court agreed that the

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<sup>267</sup> 119 F.3d at 429;

<sup>268</sup> 585 F.3d at 908;

<sup>269</sup> 556 F.3d at 500.

<sup>270</sup> See Bailey v. Columbus Bar Ass'n, 25 F. App'x. 225 (6th Cir. 2001).

timing of the appeal, days before trial, was disturbing and troubling to the trial court, and “suggesting that it suspected the defendants of improper gamesmanship.”

The Court agreed that “because these appeals were so clearly futile and apparently prosecuted for improper purposes, we conclude that sanctions are warranted.”<sup>271</sup> Therefore, pursuant to our authority under Federal Rule of Appellate Procedure 38, we hereby sanction Officer Flake in the amount of \$1500. We further sanction the City in the amount of \$1500. These sanctions are to offset some of the plaintiffs’ appellate attorney’s fees and costs, to compensate the plaintiffs, in part, for defending this frivolous appeal.”

## **42 U.S.C. §1983 SUPERVISORY LIABILITY**

### **Peatross v. City of Memphis / Armstrong, 2016 WL 1211916 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On April 23, 2013, Officers Dunaway and McMillen were on duty with the Memphis PD. They were at the Northside Market and Grocery at 6:36 p.m. when Vanterpool, pulled up at the gas punks. Vanterpool entered to make a purchase and have the pump activated. At the same time Officer Brooks called Officer McMillen about the vehicle Vanterpool was driving. Officer Brooks advised Officer Dunaway that the vehicle had expired tags and when Officer Brooks had run the tag the day before, they came back for a different vehicle. He told the officers that the same man was driving, but that he’d lost him before he could make contact.

Officer McMillen and Dunaway watched as Vanterpool pumped gas, and then approached, with Officer Dunaway, still talking on his cell phone. As the officers approached, Vanterpool tried to pull away. Officer McMillen “positioned himself in front of Vanterpool’s vehicle with his gun drawn and pointed it at Vanterpool in an effort to seize him.” He then jumped or lunged toward the hood. As the vehicle continued to move, both officers fired into the car, for a total of seven shots. The vehicle rolled across the street and came to a rest. Vanterpool died as a result.

Vanterpool’s estate, through Peatross, the Estate Representative, filed suit against the officers and the MPD. Armstrong, the MPD director, was sued as well, with the estate arguing a “direct causal link between the deficient policies and customs of the department and the violation of Vanterpool’s constitutional rights.” The complaint detailed 54 officer-involved shootings between 2009 and 2013, and 18 in the year immediately preceding the shooting. It alleged that Armstrong had created a custom and practice of exonerating officers in shootings allowing Memphis officers to believe they would suffer no penalty for improper shootings. Following the shooting death of Officer Lang, MPD, in December, 2012, officers had been on a heightened alert and that a common theme in subsequent shootings was an allegation that the individual had pointed a gun at the officers, who then shot, and that that the MPD failed to thoroughly investigate any of these claims but simply accepted the officer’s statements.

Armstrong moved to dismiss the case against him, and the District Court denied it, finding that the complaint argued sufficient facts. Armstrong appealed.

**ISSUE:** Is an adequate investigation required in every allegation of a violation of civil rights?

**HOLDING:** Yes

**DISCUSSION:** For purposes of his appeal, Armstrong properly conceded the factual allegations in the appeal, as required. In determining qualified immunity for Armstrong, you was not present at the time, the Court looked at individual versus official capacity.<sup>272</sup> In Armstrong’s case, as a supervisor, the Court noted, “supervisors are often one step or more removed from the actual conduct of their subordinates, therefore, the law requires more than an attenuated connection between the injury and the supervisor’s

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<sup>271</sup> See Kreps v. Pesina, 202 F.3d 268 (6th Cir. 1999).

<sup>272</sup> Leach v. Shelby Cty. Sheriff, 891 F.2d 1241 (6<sup>th</sup> Cir. 1989); Kentucky v. Graham, 473 U.S. 159 (1985).

alleged wrongful conduct.<sup>273</sup> The Court noted that government officials are not liable under respondeat superior, for example.<sup>274</sup> The Court acknowledged that supervisory liability requires some type of “active unconstitutional behavior.”<sup>275</sup> Active does not, however, require that the supervisor “must have physically put his hands on the injured party or even physically been present at the time of the constitutional violation.”<sup>276</sup> The Court agreed that the Estate adequately alleged the violation of Vanterpool’s rights on the part of Armstrong, by “plausibly alleg[ing] that, at a minimum, Armstrong knowingly acquiesced in the unconstitutional conduct of his subordinates.”<sup>277</sup> Armstrong was specifically involving in the training and supervision of the officers who allegedly used excessive force, and that he had previously exonerated officers without adequate investigation. He had acknowledged a need to improve the process, but had yet to have done so.

The Court agreed that the complaint “also sufficiently allege[d] a causal connection between Armstrong’s conduct and Vanterpool’s injury.”<sup>278</sup> Armstrong had failed to take action in the face of a number of shootings and had acknowledged the problem, but failed to take any action, effectively giving MPD officers a “green light” to continue. Further, the Estate had shown, at this stage, that Vanterpool was entitled to be free of an unconstitutional use of force.

The Court looked to the history of 42 U.S.C. §1983, which originated as the Ku Klux Klan Act of 1871. As part of that action, law enforcement was subject to a duty to protect citizens from deprivations of their civil rights. The Court acknowledged that “several cities in this nation today are in a state of crisis regarding civilian and police relations.” And that in this case, there are “allegations that a government official with supervisory responsibility ratified the conduct of officers who shoot first and make judgments later, evincing a brazen disregard for human life.” Further, “when internal investigations repeatedly yield only ‘rubber stamps’ of approval for unconstitutional conduct, it sends the message that human beings are not being killed by accident – they are being killed by design.

The Court acknowledged that the Estate may not ultimately be able to carry its burden of proof, but that at this stage, it had met its burden. The District Court’s decision was affirmed.

## **42 U.S.C. §1983 MEDICAL NEED**

### **Brown v. Chapman, 814 F.3d 447 (6<sup>th</sup> Cir 2016)**

**FACTS:** On December 31, 2010, at 2045, Officers Chapman and Ilain (Cleveland PD) pulled over Brown for driving without headlights. Before he could produce his documents, “the officers ordered him out of the car, unsettled by his slow speech.” He was walked to the rear of the vehicle and frisked, but during that time “Chapman hit Brown in the back of his neck and pushed Brown onto the vehicle.” Brown got free and Chapman tased him. Brown ran with the two officers in pursuit. He was tased again as he was tackled. Within seven minutes, he was subdued and handcuffed.

A recording of what happened next indicated that Brown complained of being unable to breathe. As he was being taken to the patrol car, he “went limp,” and had to be dragged and pulled into the back seat. Within a few minutes, EMS had been summoned, which was the agency’s policy when a Taser had been used. (Officer Rusnak, who made the call, had arrived as backup and testified it was not in response to any specific symptoms.” Rusnak and Merritt remained at the car with Brown, “where they watched Brown’s condition deteriorate.” The rolled down the window in response to his breathing complain, and checked his eyes with a flashlight, noting his eyes did not react to the light. Brown was not responding to question intelligibly, and Sattler, a sergeant, found him “slumped over and unresponsive.” EMS arrived with 12 minutes of the initial call. They found him “propped up,” out of the car, leaning against one of the officers. He had no pulse and could not be resuscitated.

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<sup>273</sup> Roane, 534 F.3d

<sup>274</sup> Ashcroft v. Iqbal, 556 U.S. 662 (2009); Gregory v. City of Louisville, 444 F.3d 725 (6<sup>th</sup> Cir. 2006).

<sup>275</sup> Bass v. Robinson, 167 F.3d 1041 (6<sup>th</sup> Cir. 1999); Hays v. Jefferson Cty., 668 F.2d 868 (6<sup>th</sup> Cir. 1982).

<sup>276</sup> Campbell v. City of Springboro, 700 F.3d 779 9 (6<sup>th</sup> Cir. 2012); Doe v. City of Roseville, 296 F.3d 431 (6<sup>th</sup> Cir. 2002).

<sup>277</sup> See Coley v. Lucas Cty., 799 F.3d 530 (6<sup>th</sup> Cir. 2015).

<sup>278</sup> See Campbell, supra.

Brown's mother filed suit against the officers (both named and unnamed), claiming excessive force, assault and battery and wrongful death, further claiming, in an amended pleading later, that they lacked probable cause for the initial stop and were deliberately indifferent to his medical need. The officers moved for summary judgement based on qualified immunity. The trial court gave summary judgement to some of the officers but not to Rusnak, Merritt, Sattler and the City on the issue of deliberate-indifference.<sup>279</sup> The officers appealed.

**ISSUE:** What is the standard for a pretrial detainee force case?

**HOLDING:** Deliberate indifference

**DISCUSSION:** The Court agreed that the amendment was properly allowed and that the officers were on notice that the claim of deliberate indifference was being made. With respect to the immunity claim, the Court noted that the "deliberate-indifference standard is typically applied when a pretrial detainee alleges he was denied access to adequate medical care."<sup>280</sup> The Court identified the time period in question, from when help was determined to have been needed, to when it was provided, noting that the "determining factor is 'whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct.'"<sup>281</sup> They noted that the officers were on notice that Brown was complaining about his breathing difficulties early on. However, the court acknowledged, they "may not have been able to help Brown while they were trying to handcuff him," so it assumed that "the earliest the officers could have taken steps to get Brown Assistance was immediately after he was handcuffed, when he first said 'I can't breathe.'" This was at 2052 and EMS was summoned, and arrived at 2107. As such, fifteen minutes was "more than enough time for the officers to appreciate the consequences of their actions," making the traditional deliberate-indifference standard appropriate.<sup>282</sup>

The officers noted all the actions that they did, in addition to calling EMS, to assist Brown. The Court, however, noted that it was not within their jurisdiction to address factual arguments, only legal ones. As such, the Court dismissed the appeal.

## **42 U.S.C. §1983 - HECK**

### **Rapp v. Putman / Rego / Poston, 2016 WL 1211850 (6<sup>th</sup> Cir. 2016)**

**FACTS:** In September, 2008, Rapp was a law student at Michigan State University. His activities with a campus "often put him at odds with decisions of the MSU Department of Public Safety." He had been cited on September 16 for parking at an expired meter, and angry, sought out the nearest student parking officer and asked for a supervisor. The officer, Rego, retreated to his car and called police. Putman, who responded, cited Rapp for a MSU ordinance which prohibited molesting any person carrying out a university task. Poston, the head of MSU Department of Safety, was asked to withdraw the citation, and refused. Rapp argued that Poston allowed the case to go forward because he'd been "something of a gadfly" to them, arguably a retaliatory motive.

The case moved forward, with Rapp arguing the ordinance was facially overbroad. Ultimately, the Michigan Supreme Court agreed and his conviction was dismissed.

Almost two years later, Rapp brought a lawsuit against the above parties, alleging a First Amendment retaliation claim and a Fourth-Amendment malicious prosecution claim. The parties moved to dismiss because the claims were time barred, claiming that the case started in September of 2008, not when the case was dismissed, in November, 2012. Rapp argued that under Heck v. Humphrey, the claim did not

<sup>279</sup> Note that the officers denied immunity were not the original arresting officers.

<sup>280</sup> Estate of Owensby v. City of Cincinnati, 414 F.3d 596 (6<sup>th</sup> Cir. 2005).

<sup>281</sup> Ewolski v. City of Brunswick, (2002)

<sup>282</sup> A different standard, the heightened malice standard, was also considered.

accrue under the conviction had been reversed. The District Court found the claims were brought untimely and dismissed the case.

Both sides appealed.

**ISSUE:** When does a case accrue?

**HOLDING:** When the plaintiff has a complete and present cause of action

**DISCUSSION:** The Court looked to Wallace v. Kato, which holds that a case accrues “when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.”<sup>283</sup> Under Heck, a case might be deferred until the underlying issue is resolved.

In a First Amendment case, the Court required three elements:

(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) ... the adverse action was motivated at least in part by the plaintiff's protected conduct.”<sup>284</sup> Further, in a retaliatory-prosecution claim, the plaintiff must “also show that the prosecution lacked probable cause.”<sup>285</sup>

Rapp argued that Heck's rule applied because he could not have pursued it until the conviction was resolved – and that the “the Heck rule ... delays what would otherwise be the accrual date of a tort action until the setting aside of *an extant conviction* which success in that tort action would impugn.” If, however, there is no conviction, Heck is not triggered at all. However, in this case, the court noted, his malicious prosecution claim was triggered when the prosecution was initiated, as each element existed at that time. As such, the general accrual standard applied. Since his claim accrued in 2008, his filing in 2014 is untimely with respect to the retaliatory prosecution claim.

With respect to the Fourth Amendment claim, the Court agreed that three years was the proper statute of limitations, since it follows the personal injury statute of limitations in the state in which it arises. In Michigan, that is three years. As such, the court, agreed, since that claim accrued in 2012, it was filed in a timely manner. However, the Court ruled that the case was properly dismissed under qualified immunity

To state a valid Fourth Amendment malicious-prosecution claim, a plaintiff must establish four elements:

(1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor.”<sup>286</sup>

The Court agreed that Rapp's “complaint fails on multiple fronts to state a plausible Fourth Amendment malicious-prosecution claim.” His allegations related to the lack of probable cause are “vague and conclusory.” He “does not specify what was false about Rego's or Putman's information or how that information influenced the magistrate judge's decision to find probable cause and issue a complaint.”<sup>287</sup> He “attached the police report to his response to the motion to dismiss, but again, did not

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<sup>283</sup> 127 S.Ct. 1091 (2007)

<sup>284</sup> Thaddeus-X v. Blatter, 175 F.3d 378 (6<sup>th</sup> Cir. 1999).

<sup>285</sup> Hartman v. Moore, 547 U.S. 250 (2006).

<sup>286</sup> Robertson v. Lucas, 753 F.3d 606, 616 (6<sup>th</sup> Cir.2014)

<sup>287</sup> See Meeks v. Larsen, 611 F. App'x 277 (6<sup>th</sup> Cir.2015) (holding that a complaint that “makes no effort to identify what th[e] false and misleading information was” fails to “ple[a]d specific facts necessary to establish [a] cause of action”) (internal quotation marks and bracketing omitted).

identify what portions were false or misleading. Bare assertions that he was prosecuted based on “false information” and “without probable cause” are legal conclusions, not specific factual allegations necessary to survive a motion to dismiss.”<sup>288</sup> He also “failed to allege that Poston “made, influenced, or participated in the decision to prosecute” and “to be liable for ‘participating’ in the decision to prosecute, the officer must participate in a way that aids in the decision, as opposed to passively or neutrally participating.”<sup>289</sup> The sole basis for Rapp’s retaliation claim against Poston is his refusal to intervene and stop the prosecution, but his involvement was, at most, neutral. Finally, “nowhere in his complaint does plaintiff allege that he was “seized” or otherwise detained following the issuance of the citation.”<sup>290</sup> The closest he comes is alleging that he “was subject to the authority of the 54–B District Court or appellate Courts as a direct and proximate result of the conduct of Defendants.” However, neither the Supreme Court nor this court has adopted the “continuing seizure” doctrine.<sup>291</sup> Thus, even if we assume that being “subject to the authority of the [court]” constitutes a Fourth Amendment seizure, defendants would still be entitled to qualified immunity because the particularized right alleged—the right to be free from a “continuing seizure” by virtue of a pending criminal charge—is not clearly established.<sup>292</sup>

As such, the Court agreed, the defendants were subject to qualified immunity.

## INTERROGATION

### **Clement v. Kelly, 2016 WL 611789 (6<sup>th</sup> Cir. 2015)**

**FACTS:** The events leading up to Gregory Williams’s death “began with a phone call to Williams, asking him to bring marijuana” to the Rodgers’ home to sell to them, and their cousin, Demetrius Williams. In fact, they planned to rob Gregory. They invited Green and Clement to assist, and both of those men had guns.

Gregory and Wallace drove to the home. As soon as they arrived, Green jumped in the back seat and pointed his gun at Gregory, who climbed into the back seat and began to wrestle with Green over the gun. The gun went off but no one was hit. Wallace backed up but when he shifted into drive, Clement stuck his arm in the passenger side window and shot Gregory in the chest as he was struggling with Green. Green managed to jump out of the car as it drove away.

Wallace drove to a nearby police station to find help for Gregory, who died. Clement was questioned several days later at a hospital, where he’d sought treatment for a gunshot wound to the leg. At the time he was questioned he had been arrested, and a deputy sheriff was stationed outside his room. The medical staff agreed that Clement was “okay for conversation.” Medical records indicated he’s received two Percocet 30 minutes before for pain. When Det. Volek entered, “Clement appeared alert, coherent, and engaged, and he was talking with family.” He did not grimace or groan and was sitting up, but stated he was in pain. Clement’s family was asked to leave and they did so. Clement was given his Miranda warnings and signed a waiver form. He stated he’d like to make a written statement and again signed a form. He provided a statement written in his own hand, with “very neat” handwriting. He denied shooting Gregory.

Clement was charged with Murder, Robbery, Kidnapping and related offenses. He moved for suppression and was denied. He was then convicted. He appealed, and the Ohio appellate courts upheld the statement.

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<sup>288</sup> See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (“[A] formulaic recitation of the elements of a cause of action will not do[.]”).

<sup>289</sup> Sykes v. Anderson, 625 F.3d 294 (6th Cir.2010).

<sup>290</sup> Fisher v. Dodson, 451 F. App’x 500 (6th Cir.2011) (“Traditionally, such claims entail defendants who are detained prior to trial.”); Gregory v. City of Louisville, 444 F.3d 725 (6th Cir.2006)

<sup>291</sup> Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir.2002) (“[W]e have not yet explicitly addressed the ‘continuing seizure’ doctrine.”).

<sup>292</sup> See Reichle v. Howards, 132 S.Ct. 2088 (2012) (“[E]xisting precedent must have placed the statutory or constitutional question beyond debate.”); see also Williams v. Crosby, 43 F.Supp.3d 794 (N.D. Ohio 2014) (“Far from being clearly established in September 2012, this point of law [regarding “continuing seizures” and malicious-prosecution claims] was (and remains) expressly unsettled in this Circuit.”).

**ISSUE:** May someone in the hospital, under pain medication, give a valid statement?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that under Miranda and Moran v. Burbine<sup>293</sup> his waiver was voluntary, knowing and uncoerced.

On another issue, Alfred Rodgers was a witness in both Green's and Clement's trial. He took a plea agreement and testified in Green's trial, in detail. Six weeks later, at Clement's trial, however, he claimed he could not remember any details. The state was allowed to treat him as a hostile witness and "read portions of his testimony from Green's trial into the record." Clement's attorney was able to cross-examine him at length. The Court agreed that Clement was able to confront Rodgers, and that the testimony was permitted under Crawford v. Washington.<sup>294</sup> Rodgers prior sworn testimony could properly be used and he was also available for cross-examination. (He answered most questions readily under cross examination.

Clement's conviction was upheld.

**U.S. v. Ray, 632 Fed.Appx. 260 (Mem) (6<sup>th</sup> Cir. 2016)**

**FACTS:** Thomas Ray tried to blackmail the University of Louisville by sending emails under the false name "Melinda White" to two senior officials in the school's athletics department. "Ms. White" claimed to have in her possession video evidence showing one of the starting players on the University's men's basketball team agreeing to participate in an illegal point-spread scheme. The email offered to keep the matter hushed up in exchange for \$3.5 million.

The FBI traced the emails to a home in Jackson, Mississippi, where Ray lived. Law enforcement obtained and executed a search warrant. In order to "secur[e] the scene," the officers conducting the search handcuffed Ray and put him in the back of a patrol car, but told him that they were not arresting him. They searched Ray's bedroom and found a pair of laptops that had accessed the Melinda White email account as well as an index card with the Melinda White email address and password. The emails themselves, however, were not found on either computer.

At some point during the search, the officers advised Ray of his Miranda rights, and he immediately asked for an attorney. The officers did not question him, and they eventually removed the handcuffs. They then "allowed [him] to sit on the front porch of his home while Agents completed the search." One of the officers, accompanied by an FBI agent, approached Ray and introduced himself as a Louisville police officer; he told Ray that the officers were there to investigate the Melinda White emails and that the search had revealed the incriminating index card in Ray's room. The officer explained that Ray would not be going to jail that day but that it was "very possible that [he] might in the future." "RAY still did not wish to speak with Agents but he began to sweat profusely and rub his legs rapidly. As [the agents] walked away from RAY, RAY stated 'I didn't hurt anybody.'"

Ray was indicted under 18 U.S.C. §875(d), "knowingly transmitting in interstate commerce an email with the intent to extort." He moved to suppress his "nervous physical reaction and his utterance" – contending they violated his right to counsel. That was denied and the evidence was admitted. He was convicted and appealed.

**ISSUE:** Does the right to counsel only attach at the initiation of proceedings?

**HOLDING:** Yes

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<sup>293</sup> 475 U.S. 412 (1986).

<sup>294</sup> 541 U.S. 36 (2004)

**DISCUSSION;** The Court agreed that his “Sixth Amendment argument fails because that amendment applies only after the initiation of adversarial judicial proceedings.”<sup>295</sup> There is no merit to Ray’s contention that such proceedings began with the issuance of the search warrant and the officers’ focus on him during the investigation.<sup>296</sup> Although the Court agreed the question is closer under the Fifth Amendment, but his motion and appeal focused only on the Sixth Amendment issue.

As such, “because he invoked his right to counsel, Ray was entitled to suppression of any (1) statement,<sup>297</sup> (2) made while in custody,<sup>298</sup> and (3) in response to interrogation.”<sup>299</sup> To be considered “testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.”<sup>300</sup> Thus, Ray’s nervous physical reaction was not a “statement” protected by the Fifth Amendment, but the utterance “I didn’t hurt anybody” was.<sup>301</sup>

To be considered in custody “the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”<sup>302</sup> We have highlighted four factors that are relevant to this analysis: “(1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody.” The “other indicia” of custody include:

... whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police or voluntarily admitted the officers to the residence and acquiesced to their requests to answer some questions.

In this case, the interaction took place on his mother’s front porch, not an “inherently coercive space.” The officer was not questioning Ray, but explaining who he was, “what the search had revealed, and the possible consequences for Ray.” However, Ray felt “significant pressure to remain where he was.” He had been handcuffed and the handcuffs had been removed, and he’d been ‘allowed’ to sit on the porch. Although not being directly questioned, “the context does indicate a significant level of pressure in the interaction similar to questioning.” But since Ray did not preserve the issue for appeal, it was not plainly in error.

With respect to the question of interrogation, “[a]n accurate statement made by an officer to an individual in custody concerning the nature of the charges to be brought against the individual cannot reasonably be expected to elicit an incriminating response.”<sup>303</sup>

The Court affirmed his conviction. (The Court upheld the denial, as well as the dependent state claims of battery, negligence and infliction of emotional distress.)

## **TRIAL PROCEDURE / EVIDENCE - AUTHENTICATION**

### **U.S. v. Kessinger, 2016 WL 502663 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On Monday, June 27, 2011 at 7:05 a.m., Kessinger arrived at a Dollar General store in Horse Cave, Kentucky, a store which she managed. Sometime shortly thereafter, Kessinger set fire to the store using fireworks and charcoal. She then walked calmly out of the store through the back door at 7:16 a.m. She had already made plans the night before, setting the stage, by moving items into position. The

<sup>295</sup> See McNeil v. Wisconsin, 501 U.S. 171 (1991).

<sup>296</sup> See U.S. v. Myers, 123 F.3d 350 (6th Cir. 1997) ; see also U.S. v. Ortkiese, 208 F. App’x 436 (6th Cir. 2006)

<sup>297</sup> Pennsylvania v. Muniz, 496 U.S. 582 (1990),

<sup>298</sup> Rhode Island v. Innis, 446 U.S. 291 (1980)

<sup>299</sup> Id.

<sup>300</sup> Doe v. U.S., 487 U.S. 201 (1988).

<sup>301</sup> see U.S. v. VelardeGomez, 269 F.3d 1023 (9th Cir. 2001) (en banc).

<sup>302</sup> Berkemer v. McCarty, 468 U.S. 420 (1984).

<sup>303</sup> U.S. v. Collins, 683 F.3d 697 (6<sup>th</sup> Cir. 2012).

fire was reported and three fire departments responded. She claimed she was in her office that morning and that she had fled the fire, leaving behind a sealed bank deposit bag and her purse – but no remains of either item were found. The store was already under investigation because it had been performing poorly, and an inventory would likely have led to her termination.

At trial, the government called Joseph Wagner, an employee of Integrated Security Solutions,<sup>3</sup> to testify about the Dollar General store's surveillance security system. Through Wagner, the government introduced into evidence surveillance footage from the store's security cameras. The footage was burned onto DVDs. Kessinger objected to the introduction of the DVDs on the ground that they were not properly authenticated. Specifically, she argued that the government did not lay a foundation for the date and time shown on the DVDs. The district court then instructed the government to ask Wagner whether the date and time shown on the DVDs was accurate, and if so, how he knew. The government asked Wagner to explain how the date and time are displayed on the DVDs. Wagner gave the following explanation:

Q [government]: And as far as the security footage that [the DVR system] captures, does it collect a time and date of the video footage that it collects?

A [Wagner]: Yes.

Q [government]: And how does it do that? Well, not technically, but it does that on the disks -- or on the footage that it's capturing on the DVR?

A [Wagner]: When the DVR is set up, you set a time and date within the software.

Q [government]: Yes, sir.

A [Wagner]: And then it uses that time and date. As information's coming in -- as video is coming into the hard drive, it marries the date and time together.

Q [government]: And based on the DVR coming from Central Time Zone, what time would it have on those video footage that's collected?

A [Wagner]: The DVR would be set to Central Time Zone, so that would be the time that it has.

She was charged with federal Arson<sup>304</sup> and convicted. She then appealed.

**ISSUE:** Must security recordings be authenticated?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, during the trial, the Court addressed whether the DVDS from the camera had been properly authenticated under FRE 901. The Court agreed that the witness was the a proper party to authenticate the video, as he could base his testimony on personal knowledge of how the system worked. Although the "the person who installed the surveillance system did not testify and that the date and time may be formatted incorrectly. This argument, however, does not implicate the DVDs' admissibility but instead goes to the weight that should be attributed to them."<sup>305</sup> The district court therefore did not abuse its discretion in admitting the DVDs into evidence.

Further, the evidence of prior thefts of money, including the money that was unaccounted for after the fire, and her prior use of an improper second ledger, was properly introduced as a motive.

The Court upheld her conviction.

## **TRIAL PROCEDURE / EVIDENCE - PROCEDURE**

### **U.S. v. Fults, 2016 WL 1239200 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On November 19, 2012, Deputy Cavanaugh (Warren County, TN, SO) received a text from Briest, a CI, that he had set up a deal to buy a revolver from Fults. With Cavanaugh's assent, he negotiated a deal and told Fults to come by his apartment to complete the deal. Briest was wired and

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<sup>304</sup> 18 U.S.C. 844(i).

<sup>305</sup> U.S. v. Allen, 106 F.3d 695(6th Cir. 1997).

given cash to buy the gun. Briest returned to his apartment and in due course, Fults and Polson (his girlfriend) arrived and the sale was consummated. (Briest's girlfriend, Moulton, was also present.) Fults, when asked, denied the gun was stolen and even provided a bill of sale. (Polson signed the document, not Fults, however.) The gun and document were subsequently given to Cavanaugh, and Briest later provided a signed statement as well.

Fults, a conviction felon was charged with possession of the gun, and he was promptly convicted. He then appealed.

**ISSUE:** Is an audio recording transcript evidence?

**HOLDING:** No

**DISCUSSION:** During the trial, a typed transcript of the transaction was admitted, and it was attested to by Cavanaugh, who knew all the voices on the tape. The audio was admitted, with the transcript only intended to be a demonstrative aid. No objection was made at the time. Fults' counsel agreed it was a true and correct transcript but objected to it being considered evidence. The judge properly admonished the jury that the transcript was only intended to support the recording, and that if they detected a discrepancy between the two, that the recording was what they should go by. The court noted that a transcript used as a demonstrative aid was not to be used during deliberation, and it was, apparently provided. However, Fults's counsel never questioned the authenticity of the tape itself and did not object when it was provided to the jury.

As there was no inaccuracy alleged, and although it was technically improper to admit it, the Court agreed the error, if any, was harmless. The Court also discussed the text message Cavanaugh received from Briest, and the Court asked that Briest explain how he knew the message was from Fults (or at least his phone) – with the detective indicating that they'd regularly communicated in that way. The Court looked to earlier cases involving text messages. It agreed that the message lacked any unique or distinctive features, but that the message came from Fults' number and that he appeared shortly after sending the message. And again, even if improper, the court agreed that the admission of the information as harmless.

Fults' conviction was affirmed, but his sentence under the ACCA was vacated and remanded.

### **Brizendine v. Parker, 2016 WL 1169085 (6<sup>th</sup> Cir. 2016)**

**FACTS:** Brizendine was charged with the murder of Nash and Wilson, in Louisville. Following his conviction, he pursued an appeal in which he argued his attorney was delinquent in not exploring the allegation that the "wallet listed on a police inventory belonged to Nash and that first-responding police officers disturbed the crime scene by pulling out Nash's pocket. (During the trial, it was alleged that "Brizendine went through Nash's pockets and stole things after the murders.") The Court had ruled against Brizendine's demand for a hearing on the issue, and he appealed.

**ISSUE:** Is ineffective counsel (if proven) enough to warrant a new trial?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that to be successful, he had to show that there is at least "some merit" to his claim that his attorney's performance prejudiced him. The Commonwealth had argued that there was other evidence of robbery, and that even if it was shown that the police removed the wallet, that didn't negate the other evidence that indicated robbery. The Court, however, ruled that Brizendine had raised the point sufficiently to allow him to go forward on the claim.

He also argued that his trial counsel was ineffective for not raising a claim of "extreme emotional disturbance." The Court noted that would have required his defense counsel to "present two inconsistent

defense theories” – as they were proceeding on the theory that Brizendine wasn’t there at all. As such, that claim didn’t merit a hearing.

## **TRIAL PROCEDURE / EVIDENCE - WITNESSES**

### **Bryant v. City of Memphis, 2016 WL 683241 (6<sup>th</sup> Cir. 2016)**

**FACTS:** Bryant, a firefighter, sued the City of Memphis Fire Department and Forest, his Battalion Chief, on assault and failure to train and supervise allegations. (The two got into an altercation at a fire scene.) Following a trial under 42 U.S.C. §1983, the jury found in Forrest’s favor on some of the allegations, and in the City and Bryant’s favor in others. Bryant appealed the adverse rulings.

**ISSUE:** Is testimony about a co-worker’s temperament admissible?

**HOLDING:** No (as a rule)

**DISCUSSION:** Among other issues, Bryant argued that interactions that the City Attorney had with the witnesses to the original incident resulted in the adjustment of the witnesses’ testimony. The City Attorney agreed that the meeting occurred and that it was proper, and that it was appropriate to explore inconsistencies and such prior to trial. Bryant also wanted to introduce the post-incident written statements, admitted unsworn hearsay.<sup>306</sup> Again, the Court agreed the trial court’s decision on it was proper.

Also, Bryant argued he should have been allowed to testify about Forrest’s “hot-headed and aggressive character.” The trial court excluded it under FRE 404(a), which prohibits the admission of character evidence. However, the Court agreed, it was not inadmissible under that rule. But, it continued, it would have been inadmissible under FRE 403. The Court agreed that the statements related to Forrest’s “angry temperament” but that Bryant made no offers to prove any “instances of violent conduct to support his claimed knowledge of Forrest’s aggressive character.” Since “propensity evidence” was improper, and “the character evidence here posed a danger of the jury impermissibly inferring propensity and bad character” would distract the jury from the case at hand. The Court agreed that it was proper to bar the evidence from trial.

## **CHILD PORNOGRAPHY**

### **U.S. v. Gray, 2016 WL 456936 (6<sup>th</sup> Cir. 2016)**

**FACTS:** On February 14, 2013, a Ohio state officer identified an IP address that had files including child pornography via a peer-to-peer sharing program. He downloaded three files and confirmed. He obtained subscriber information from the internet provider, Helen Gray. He learned that Gray lived there with his mother, Helen. On April 17, they searched the home, finding a computer in the dining room. It was found to contain child pornography and was connected to the suspect IP address. It also contained software designed to securely delete files, and there was an indication that files had been deleted.

Gray was indicated on a variety of federal charges relating to the child pornography and the computer. He was convicted and appealed.

**ISSUE:** Is possessing and receiving child pornography usually double jeopardy?

**HOLDING:** Yes (but see discussion)

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<sup>306</sup> Presumably the witnesses in question did not testify.

**DISCUSSION:** Gray claimed that the charges – essentially, knowingly receiving and knowing possessing, violated the Double Jeopardy Clause. Using the Blockburger<sup>307</sup> test, the court agreed that “convictions for both knowingly possessing child pornography and knowing receiving the same child pornography constituted multiple punishments for the same conduct.”<sup>308</sup> It will stand, however, “if *separate conduct* underlies the two charges.”<sup>309</sup> The indictment did indicate, by date, that two different blocks of evidence were involved and at trial, there was an effort to distinguish the two separate convictions.

Gray always argued there was insufficient evidence that he did, in fact, either possess or receive child pornography. The court noted that although his mother owned the house, and the computer, but she did not know the password. His mother worked during the day, and the evidence indicated the computer usage was during the day. As such, the circumstantial evidence indicated he was responsible.

The Court upheld his convictions.

## **EMPLOYMENT**

### **Bauer v. Saginaw County, 2016 WL 502782 (6<sup>th</sup> Cir. 2016)**

**FACTS:** Bauer served as the office manager for the Saginaw County Prosecutor for over 20 years. When a new prosecutor took office, after a heated primary, the new officeholder offered her a different position, as he would be bringing in his own person as the new office manager. She refused and was terminated. She then filed suit. The trial court ruled in favor of the county, and Bauer appealed.

**ISSUE:** May a patronage employee be terminated or demoted?

**HOLDING:** Yes

**DISCUSSION:** Bauer argued that her termination violated her First Amendment right of political association. Although patronage dismissals are typically prohibited under Elrod v. Burns,<sup>310</sup> there is an exception when “political affiliation is a legitimate requirement for government employment.”<sup>311</sup> The position in question qualified as a confidential employee.

The Court looked to the four categories under the Elrod -Branti<sup>312</sup> exception:

Category One: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;

Category Two: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction’s pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;

Category Three: confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors;

Category Four: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

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<sup>307</sup> 284 U.S. 299 (1932).

<sup>308</sup> U.S. v. Ehle, 640 F.3d 689 (6<sup>th</sup> Cir. 2011).

<sup>309</sup> U.S. v. Dudeck, 657 F.3d 424 (6<sup>th</sup> Cir. 2011).

<sup>310</sup> 427 U.S. 347 (1976),

<sup>311</sup> *Id.* at 366–68; see McCloud v. Testa, 97 F.3d 1536 (6<sup>th</sup> Cir. 1996).”

<sup>312</sup> Branti v. Finkel, 445 U.S. 507 (1980). The two cases are usually linked together.

Although not hard and fast, these categories being simply a guide, any ambiguity is construed in favor of the government employer. Looking at the job description, the Court agreed that the position involved making budget decisions and exercising a great deal of discretion over the office. The position holder advises the prosecutor “on policymaking decisions related to personnel, office policy, and budget administration.” And is privy to confidential communications and serves as a gatekeeper. The Court upheld her dismissal.

## **SCHOOLS**

### **Stiles v. Grainger County (TN) 2016 WL 1169099 (6<sup>th</sup> Cir. 2016)**

**FACTS:** DS attended Rutledge Middle School, in Grainger County, for a year and a half (2010-2012) as a 7<sup>th</sup> and 8<sup>th</sup> grader. During that time, he was “involved in a string of verbal and physical altercations with other students.” He and his mother repeatedly complained that he was being bullied. School officers investigated and corroborated some of the instances, and the offenders were disciplined. DS was placed in classes different than his harassers. Ultimately, after an attack in a school restroom, he transferred. DS filed suit, through his mother (Stiles) against various school officials and McGinnis, the Chief of the Rutledge Township PD, who also served as a part-time SRO.

During the development of the case, various instances were discussed. In several instances, students accused of harassment were given suspension and other punishments. Most critically, on May 17, 2011, DS was injured during an altercation in gym class. School officials and McGinnis watched a video of the situation, but it was not dispositive.<sup>313</sup> As part of the investigation, some teachers indicated that DS “sometimes instigated problems by making mean comments and that he enjoyed the drama of conflict at school.” At some point, Stiles met with McGinnis, who apparently blamed DS in part, and suggested that DS learn to defend himself. DS was given McGinnis’s contact information but was told not to harass students himself, or to “report them for trivial teasing.” At the end of his 7<sup>th</sup> grade year, it was agreed that he would be placed in a class with his friend, and that his identified harassers would not be placed in the same class.

During the eighth grade, DS alleged experienced pushing and name calling, but he only complained to the school in a couple of situations. The most serious altercation occurred on January 17, 2012, in which he was allegedly punched and kicked in a school restroom. DS allegedly reported it to the school and Stiles made a complaint to the PD about it. The school investigated and much of what DS stated was corroborated. The primary assailant received an eight day in-school suspension and another juvenile received a three-day suspension. Before the school could take further action, DS was removed by his mother and transferred. During his time at the school, DS suffered a number of physical injuries, includes fractured ribs and a compression fracture to his spine, along with “busted mouths, a busted nose [and] bruises.” He did, however, make straight As and was in advanced classes.

Stiles filed suit against the school system and the PD, on behalf of her son. The District Court granted the defendants summary judgment and Stiles appealed.

**ISSUE:** May a student sue for sexual harassment?

**HOLDING:** Yes

**DISCUSSION:** Stiles pursued the case under Title IX, 20 U.S.C. §1681(a), in which schools can be sued for “deliberate indifference to student-on-student sexual harassment ‘in certain limited circumstances.’”<sup>314</sup>

To succeed:

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<sup>313</sup> The video was not part of the record because they did not know how to copy it, and it was ultimately recorded over.

<sup>314</sup> Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

DS must demonstrate the following elements: (1) sexual harassment so severe, pervasive, and objective offensive that it could be said to deprive the plaintiff of access to the education opportunities or benefits provided by the school, (2) the funding recipient had actual knowledge of the sexual harassment, and (3) the funding recipient was deliberately indifferent to the harassment.”<sup>315</sup>

The Court agreed that the school did have actual knowledge of the situation, as several school official defendants admitted they knew of the ongoing problems. However, The Court noted, DS clearly failed improving the third elements, as the school officials were not deliberately indifferent, a very high bar. The Court noted that each time DS or Stiles made a specific complaint, the school “investigated promptly and thoroughly.” Identified students were discipline. Proactive steps were made to reduce the chance of harassment, within the constraints of the school. The remedial responses were reasonable.<sup>316</sup> Even though they did not eliminate the problems DS was experiencing, the school “never abandoned an effective solution to DS’s problems.” Further, there was reason to believe DS was an active instigator in some situations. The punishment in each case was tailored to the situation. As such, the school was not deliberately indifferent to DS’s plight.

The Court also looked at a §1983 Equal Protection claim. The Court noted that at least some of the harassment seemed to be founded on the belief by other students that DS was homosexual. The Court noted that there was no evidence at all as to how the school “treated other students – male or female, heterosexual or homosexual – who similarly complained about or suffered from bullying.” As such, his equal protection claim failed.

The Court also addressed the issue of an alleged “special relationship” – with DS claiming the school had promised “to take action to protect him.” The Court noted that the school, however, as required by *DeShaney*, “restrain DS’s or his parents’ freedom to act on his behalf.” Nor was there a state created danger, as the school did noting that qualified as an “affirmative act that created or increased DS’s risk of danger.” They did not ignore the situation and attempted to take action to reduce it, as well. Most of the allegedly actions asserted “are plainly omissions rather than affirmative acts.” Nothing the school did increased his exposure to “peer harassment,” or made his less safe than he was before.

The Court upheld the District court’s grant of summary judgement.

## MISCELLAENOUS

### **Adams v. Bradshaw (Warden), 2016 WL 963862 (6<sup>th</sup> Cir. 2016)**

**FACTS:** During Adams’ trial on capital murder charges, he was required to wear a stun belt throughout the trial. The prosecution had argued at a hearing that “its motion to use the stun belt in this case stemmed from Adams’s recent convictions and sentencing for murder and rape in an unrelated case as well as Adams’s statements to two mental health professionals indicating that he would attack his previous counsel if he saw them again.” It was also noted that there was concern about the “emotional intensity” of the courtroom spectators, as well, with a number of representatives of the victim planning to be present. The Sheriff’s Department had wanted to “take all reasonable precautions to make sure that we have a safe and secure trial.” Adams’ counsel had refuted the concerns, noting in addition that Adams had epileptic seizures and that use of the device could cause him harm. The Chief Deputy of Trumbull County had noted that the use of the stun belt would be a better alternative than “four deputies jumping on somebody with night sticks.” He described how the stun belt worked and that they were used in many of the counties. He testified that ““a heart condition and muscular dystrophy were the only two that were listed” in the associated materials, though he noted that he was “not a physician, so I really can’t answer.” He stated someone touching Adams when the belt was triggered would not be shocked and that it had been tested on volunteer employees. He further discussed the process that had been used in the recommendation that the belt be used. The Court concluded its use was appropriate, especially given

<sup>315</sup> *Patterson v. Hudson Area Schs.*, 551 F.3d 438 (6<sup>th</sup> Cir. 2009).

<sup>316</sup> See *S.S. v. Eastern Kentucky University*, 532 F.3d 445 (6<sup>th</sup> Cir. 2008).

that it would be less obvious to a jury than shackles might be. The Court also overruled the objection as to the number of deputies, three, that would always be in the courtroom. Mental health experts indicated that Adams might “have difficulty in adequately controlling his frustration and anger.”

Adams appealed the issue up, arguing that it prevented him from a fair trial, but the Ohio courts disagreed, upholding its use. The U.S. District Court agreed, finding that it was ““was the least of any potentially prejudicial, but adequate means of providing courtroom security.” Adams further appealed.

**ISSUE:** Is a stun belt permitted at trial?

**HOLDING:** Yes

**DISCUSSION:** The Court looked first to the case of Holbrook v. Flynn,<sup>317</sup> noting that:

All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant’s right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

Looking to Illinois v. Allen, the Court “noted that shackling is “inherently prejudicial” and “should be permitted only where justified by an essential state interest specific to each trial.”<sup>318</sup> Further, in Deck v. Missouri, the Court had reviewed the history of shackling, and noted that “[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need.”<sup>319</sup>

The Court concluded:

[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.

The Court noted that in the penalty phase of the trial, before the jury, Adams told the jury that he was wearing a stun belt. The Court agreed that it was a proper decision by the trial court to order the use of the stun belt.

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<sup>317</sup> 475 U.S. 560 (1986).

<sup>318</sup> 397 U.S. 337 (1970).

<sup>319</sup> 544 U.S. 622 (2005).